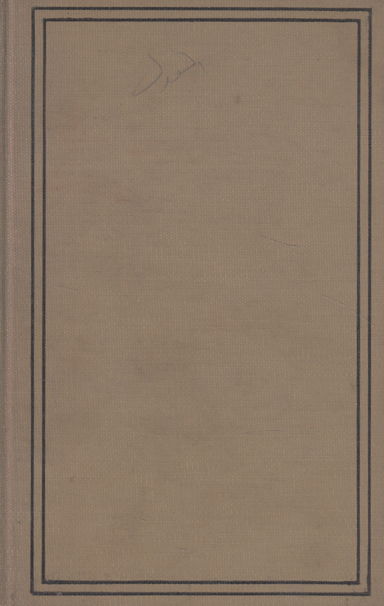








CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

DECEMBER 4, 1939, TO MARCH 31, 1940

WITH

ABSTRACT OF DECISIONS OF THE SUPREME COURT IN COURT OF CLAIMS CASES

REPORTED BY

JAMES A. HOYT

VOLUME XC

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AMENDMENTS TO RULES

Order of the Court amending Rule 29:

It is ordered this 29th day of February, 1940, that Rule 29 of the Rules of the Court of Claims be and the same is amended by adding at the end of the second paragraph thereof the following:

> "*Provided,* That the tender of fees shall not apply to witnesses summoned by the United States."

Rule 29 as thus amended will read:

> "29. A witness may be summoned at the request of either party to the proceeding by delivery of a subpoena issued by the court.
>
> "If a witness, having been duly summoned under section 269, United States Code, title 28, and his fees tendered him, shall fail or refuse to appear and testify before any officer authorized to take his testimony, a rule upon him will be issued by the court, on motion, to show cause why he should not be punished as for a contempt: *Provided,* That the tender of fees shall not apply to witnesses summoned by the United States."

Order of the Court amending Rule 99:

It is ordered this 10th day of April, 1940, that the Rules of the Court of Claims be, and they are hereby, amended by renumbering the present RULE 99 as 99 (*a*) and by adding to said rule an additional paragraph numbered 99 (*b*) and reading as follows:

> "99. (*b*). Whenever a certified transcript of the record is requested by the plaintiff or his attorney of record, or by the Assistant Attorney General, for the purpose of filing a petition for a writ of certiorari in the Supreme Court, and the plaintiff or defendant

desires not only the pleadings, findings of fact, conclusion of law, judgment and opinion of the Court but also 'other parts of the record as are material to the errors assigned,' the party making the request for the record shall file with the Court, not more than forty-five (45) days after judgment has been entered, a copy of the petition for the writ of certiorari and an original and five (5) copies of such parts of the record as, in his judgment, are material to the errors assigned, and serve upon the opposing counsel a copy of the same at the same time it is filed in the Court.

"Unless the parties can agree as to the parts of the evidence in the record which are material to the errors assigned, then counsel for the party so objecting shall, within ten (10) days from the date of the filing in the Court and service upon him of the above record, file with the Clerk of the Court an original and five (5) copies of such parts of the evidence as he considers should become part of the record to be certified, and at the same time serve upon the appellant's attorney a copy thereof. The Court will then settle the record to be certified.

"See Rule 41 of the Supreme Court as amended March 25, 1940, and Supreme Court General Equity Rules."

LEGISLATION RELATING TO THE COURT OF CLAIMS

[PRIVATE—No. 303—76TH CONGRESS]

[CHAPTER 99—3D SESSION]

[S. 1962]

AN ACT

Granting jurisdiction to the Court of Claims to reopen and readjudicate the case of Carrie Howard Steedman and Eugenia Howard Edmunds.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Court of Claims be, and it is hereby, vested with jurisdiction and directed to reopen and readjudicate the case of Carrie Howard Steedman and Eugenia Howard Edmunds against the United States, numbered E–563, decided February 28, 1927, and reported in volume 63, Court of Claims Reports, at page 226, upon the evidence heretofore submitted to the said court in the said cause, giving due weight in such readjudication to any decision of the Supreme Court of the United States rendered since February 28, 1927, construing the relevant provisions of the applicable statutes, particularly the identical terms of section 402 of the Revenue Acts of 1918 and 1921, and if such Court of Claims in such readjudication shall find upon said evidence that, under the provisions of the Revenue Act of 1921, the plaintiffs are entitled to a judgment under the relevant statutes, as now construed by the Supreme Court of the United States, particularly the terms of section 402 of the Revenue Acts of 1918 and 1921, then the court shall enter its judgment in favor of the said Carrie Howard Steedman and Eugenia Howard Edmunds in said cause for such sums as said evidence will justify, not to exceed the amount claimed in the original petition in the Court of Claims, with interest as provided by law.

Approved, April 13, 1940.

CASES DECIDED

IN

THE COURT OF CLAIMS

December 4, 1939 to March 31, 1940.

BROWNSTEIN-LOUIS COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 44108. Decided[1] October 2, 1939]*

On Demurrer

Rental of property by Government; breach of contract.—Where representative of the Government negotiated with the plaintiff for rental of space for certain governmental agencies and in pursuance of such negotiations plaintiff made extensive alterations to suit the needs of the respective agencies, 12 of the agencies entering into leases with plaintiff commencing on June 30, 1930, for 1 year, renewable from year to year at the option of the Government until and including the year 1935, and where one of the said agencies, the Internal Revenue Bureau, before the time for acceptance of the space reserved for it in plaintiff's building refused to execute the proposed lease, to move into the building, or to use the space reserved by it, and has never occupied said space, it is held that a breach of the contract occurred at that time, July 1, 1930, and plaintiff then had cause of action for the rent as it accrued.

Same.—Plaintiff, it is held, also had an option to delay the commencement of a suit until a full year's rent had been earned and upon failure to make payment of rent a cause of action accrued.

Same; commencement of suit within statutory period.—Plaintiff, having delayed to bring suit for more than 6 years, its petition having been filed on October 10, 1938, it is held that the cause of action is barred under the provisions of section 156 of the Judicial Code, which imposes a limitation of 6 years in which suit may be brought after a claim accrues.

---

[1] [On October 23, 1939, the court entered an order allowing plaintiff an extension of 30 days, until December 2, 1939, within which to tender an amended petition, with motion for leave to file, and on November 29, 1939, such motion was filed; and on December 6, 1939, plaintiff's motion was overruled.]

*Certiorari denied May 20, 1940.

Same; limitation on rental of property by Government.—Where plaintiff claims it had 6 years from the expiration of the 5-year period for which a lease had been made in which to bring suit, it is held that under sections 3732 and 3679 of the Revised Statutes no contract for the rental of property can be entered into by the Government for more than 1 year and where a contract is made for a longer term of years, an option has to be exercised before the beginning of the next fiscal year.

Mr. Don Marlin for the plaintiff.

Mr. John B. Miller, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The facts sufficiently appear from the opinion of the court.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The allegations of the complaint show that on September 15, 1929, Colonel Dennis P. Quinlan, allegedly representing the President of the United States in the matter of coordinating the activities of the Federal agencies in Los Angeles, California, negotiated with the plaintiff for the occupancy by the Federal Government of plaintiff's building in Los Angeles for a period of not less than five years for the purpose of housing thirteen agencies doing business in that city at an agreed rental, such occupancy to commence on July 1, 1930, by each of such agencies; that the agencies concerned, through their local representative, submitted plans for alterations for the said building to suit their particular needs; that Colonel Quinlan requested plaintiff to lease its building to the United States Government for the purposes mentioned and that plaintiff consented to do so; that plaintiff made extensive alterations, including that portion of the building to be occupied by the Internal Revenue Department; that twelve of the agencies entered into leases with plaintiff commencing on June 30, 1930, for a period of one year, renewable from year to year at the option of the United States Government until and including the year 1935; that eight days before the time for acceptance by the Internal Revenue Department of the space reserved for it in plaintiff's building, the Internal Revenue Department refused to execute the lease, to move into the building or use the space reserved by it and has not occupied such space but, on the other hand, obtained other quarters in Los

Angeles; that by reason of the loss of rental which plaintiff expected to obtain from the Internal Revenue Department it was required to go into a receivership and lost its building and lands by foreclosure proceedings; and that it is damaged in the amount of $2,008,353.19.

Plaintiff filed its petition on October 10, 1938, and on November 15, 1938, defendant interposed a demurrer alleging several grounds on which the complaint should be dismissed. We do not think it necessary to discuss the several grounds mentioned in the demurrer for the reason that there appears an insuperable bar for recovery on the face of the complaint.

It will be seen that the contract on which plaintiff brings this action was for the rental of the space to be occupied by the Internal Revenue Department commencing on July 1, 1930. Before the first of July, the Internal Revenue Department notified plaintiff that it would not occupy the premises. A breach of the contract occurred at that time and plaintiff had a cause of action for the rent as it accrued. However, plaintiff also had an option to delay the commencement of a suit until a full year's rent had been earned and upon the failure to make payment a cause of action accrued. Under the provisions of Sec. 156 of the Judicial Code (36 Stat. 1139) there is a limitation of six years in which to bring a suit after the claim accrues. Plaintiff has delayed to bring suit for more than six years and therefore the cause of action is barred and no recovery can be had.

Plaintiff claims that it had six years from the five-year period for which the lease had been made. Under Sec. 3732 and 3679 of the Revised Statutes, 34 Stat. 255; 34 Stat. 48, no contract for the rental of property can be entered into by the Government for more than one year and when a contract is made for a longer term of years, an option has to be exercised before the beginning of the next fiscal year. In *Reed Smoot* v. *United States*, 38 C. Cls. 418, 427, in construing the above sections of the Revised Statutes, the court held that—

> The provisions of the sections clearly limit the liability of the Government by the appropriations made for each fiscal year, and the contract of the kind embraced in this proceeding is impressed with the limitations of those sections.

Syllabus

In *Leiter* v. *United States*, 271 U. S. 204, 207, the court held that—

> A lease to the Government for a term of years, when entered into under an appropriation available for but one fiscal year, is binding on the Government only for that year. *McCollum* v. *United States*, 17 Ct. Cls. 92, 104; *Smoot* v. *United States*, 38 Ct. Cls. 418, 427. And it is plain that, to make it binding for any subsequent year, it is necessary, not only that an appropriation be made available for the payment of the rent, but that the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year; thereby, in effect, by the adoption of the original lease, making a new lease under the authority of such appropriation for the subsequent year.

The demurrer is sustained and the petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

YOUNG-FEHLHABER PILE COMPANY, A CORPORATION v. THE UNITED STATES

[No. 43841. Decided November 6, 1939. Defendant's motion for new trial overruled February 5, 1940]

On the Proofs

Government contract; implied provision to furnish labor.—Where contract between the plaintiff contractor and the Government provided that of the persons employed on the project preference should be given to persons referred for such work by the United States Employment Service and from the public relief rolls, and where the United States Employment Service was not able to furnish a sufficient number of men qualified to carry on the work and the necessary number of men could not be obtained in accordance with the terms of the contract, it is held that the contract carried an implied provision that the defendant would furnish the necessary workmen to complete the work within the required time, and its failure so to do was a breach of the contract.

Reporter's Statement of the Case

Same.—Where the contract provided that the provision as to obtaining labor from the public relief rolls might be waived with the specific authorization of the Works Progress Administration, and where no request for such waiver was ever made by the plaintiff, it is held that the plaintiff violated no provision of the contract by not requesting such waiver, since there was nothing in the contract that required the Works Progress Administration to give such permission or consent; and, further, no such labor was available even if such request had been made.

Same; delay by strike.—Where there was a further delay caused by a truck drivers' strike, it is held that since the defendant was in no way responsible for said strike, it is not liable for such further delay.

Same; signing voucher for final payment not a bar to recovery.—Where plaintiff executed a voucher for final payment in accordance with the terms of the contract, but before such execution had notified the contracting officer, representing the defendant, that it would ask additional compensation on account of the delay, it is held in the circumstances of the case plaintiff was not barred from recovering damages by the signing of the voucher.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *Mr. George R. Shields* and *King & King* were on the briefs.

Mr. J. H. Reddy, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. Young-Fehlhaber Pile Company, plaintiff, is a corporation organized under the laws of the State of New York. Plaintiff has its principal place of business in the City of New York, New York; and is engaged in the contracting business. Mr. Fred R. Fehlhaber is the president of the corporation.

2. On November 10, 1936, plaintiff entered into a contract with the United States. Under the terms of the contract, plaintiff agreed to furnish all labor and materials, and perform all work required for reinforcing the south pier of Summit Bridge over the Inland Waterway from Delaware River to Chesapeake Bay, Delaware and Maryland, for the consideration of $41,783. Plaintiff agreed to complete the

work within 100 days after receiving, from defendant, its notice to proceed. This contract, together with accompanying specifications, is attached to the petition as plaintiff's Exhibit A and is, by reference, made a part of this finding.

3. Article 19 of the specifications reads, in part, as follows:

> ART. 19. (a) *Labor preferences.*—With respect to all persons employed on projects, except as otherwise provided in Regulation No. 2 (a), they shall be referred for assignment to such work by the United States Employment Service and (b) preference in employment shall be given to persons from the public relief rolls and, except with the specific authorization of the Works Progress Administration, at least ninety percent (90%) of the persons employed on any project, shall have been taken from the public relief rolls: *Provided, however,* That, expressly subject to the requirement of subdivision (b), the supervisory, administrative, and highly skilled workers on the project, as defined in the specifications, need not be so referred by the United States Employment Service.

4. On November 30, 1936, plaintiff received written notice to proceed with its work. This notice fixed March 10, 1937, as the date for its final completion. On December 17, 1936, plaintiff placed its equipment on the site, preparatory to commencing its work on December 18, 1936.

On December 16, 1936, plaintiff made its first request to the United States Employment Service for workers. The request was for six leadsmen and eight laborers to report for work on the morning of December 18, 1936. Leadsmen were classified as semiskilled laborers. Some of the requested men appeared on the site and began work on December 18, 1936; however, eight laborers did not so report until January 8, 1937, and six leadsmen had not reported for work on March 12, 1937.

5. Plaintiff's experience with its first request for workers was typical throughout the greater part of the contract period of performance. Plaintiff kept in daily touch, by telephone, with the United States Employment Service at Wilmington, Delaware, which was about 15 miles from the site of the work. The Wilmington Bureau was the one designated from which plaintiff was to receive its labor.

Plaintiff repeatedly requested the employment service to send men to the work but sufficient men were not supplied and did not report to plaintiff. Such men as did report were in many cases not qualified to perform the type of work for which they had been requested and plaintiff was forced to train such men on the job as best it could. Plaintiff's president had a number of conferences with Captain Ker, the engineer officer in charge of the work for defendant, in which plaintiff endeavored to obtain additional workers. In these conferences the labor situation was discussed and it was understood and conceded by the contracting officer that a sufficient supply of qualified labor for the work required by the contract could not be obtained through the offices designated by the United States Employment Service and that plaintiff desired to secure workers from other sources. Captain Ker took up the matter with the officials of the United States Employment Service but while some men were furnished the work was dangerous and not enough workers were obtained. On account of the hazardous nature of the operation and the fact that not enough men were furnished, the plaintiff's president in substance submitted a proposition to the officials of the Employment Service to use his own men, but these officials in effect declined to consider it and told him to go along with what he had, and plaintiff was not given permission to use his own men. The United States Employment Service furnished what men it could but sufficient suitable workers were not obtainable in the manner required by the contract and nothing further was done in view of this situation except the plaintiff was subsequently granted an extension of time, pursuant to a finding by the contracting officer that the United States Employment Service and designated local offices were unable to supply a sufficient number of qualified workmen necessary to carry out the work under the contract. In the negotiations above referred to, the plaintiff did not personally communicate with the Works Progress Administrator and ask him to waive the provision in the contract providing that except with the specific authorization of the Works Progress Administration at least 90 percent of the labor employed shall have been taken from the public relief rolls. Because of the inability of the United States Em-

ployment Service to furnish sufficient qualified workmen to carry on the work and the fact that such workmen were not obtainable in the manner required by the contract, plaintiff could not comply with the provision of the contract that at least 90 percent of the labor employed should be taken from the public relief rolls, and any action taken by the Administrator of the Works Progress Administration would not have enabled the plaintiff to obtain more qualified workmen or in any way have altered the situation.

6. On March 2, 1937, plaintiff made a written request to Captain Ker for an extension of time, because the employment service could not furnish it with the amount of men required. On March 3, 1937, Captain Ker replied to this letter suggesting that plaintiff make its request more specific and advise defendant as to the amount of time it would require to complete the contract work. On March 12, 1937, plaintiff's president replied, which letter reads in part as follows:

> We beg to acknowledge receipt of your letter of March 3rd, 1937, and in answer thereto wish to state Mr. Benson and Mr. Lawes of Delaware State Employment Office have cooperated with us to the fullest extent and the fact that we could not get the required labor was not due to any laxity on their part but caused by the fact the men were not available.
>
> * * * * *
>
> From the above analysis we would request that we be granted an extension of time sufficient to complete the work. We feel that we should complete the whole job on or about April 15th provided we are supplied with the necessary labor. The fact that we were severely handicapped on the labor situation is causing us considerable more money in overhead and equipment and we trust that in appreciation of the facts stated above we will be granted an extension of time with no penalty.

7. On March 8, 1937, the contracting officer issued change order no. 1. This change order reads in part as follows:

> It has been determined that in view of the fact that sufficient supply of qualified labor could not be obtained through offices designated by the U. S. Employment Service, it is necessary and in the best interest of the

United States to modify said contract in certain particulars as follows:

> Between December 18, 1936, and March 1, 1937, inclusive, the U. S. Employment Service and designated local offices were unable to supply a sufficient number of qualified Leadsmen and Laborers necessary to properly carry out the work under this contract. It is determined from reports, records, and information at hand, the contractor was actually delayed twenty-three days and extension of time is granted under Article 9 of contract.
>
> It is understood and agreed that on account of the foregoing modification of said contract, twenty-three (23) days' additional time will be allowed.
>
> It is further understood and agreed that all other terms and conditions of said contract shall be and remain the same.

8. Plaintiff subcontracted the concrete work to J. A. Bader & Company, Wilmington, Delaware. The contract provided that the subcontractor was to deliver the concrete material to the site of the work. On March 14, 1937, a truckmen's strike was called in Wilmington, Delaware, and continued in effect from March 14, 1937, to April 7, 1937. This strike rendered it impossible for plaintiff, and its subcontractor on the concrete work, to obtain necessary supplies for use in the performance of the contract during the continuance of the strike.

9. Under date of April 1, 1937, the district engineer wrote plaintiff, which letter is known as "Change Order No. 2," and reads, in part, as follows:

> It has been determined that in view of the fact that a truck drivers' strike in Wilmington, Del., caused delays in the delivery of materials and supplies necessary to carry on the work under the contract, it is deemed necessary and in the best interest of the United States to modify said contract in certain particulars as follows:
>
> > Between March 14 and April 7, 1937, a truck drivers' strike was in effect in Wilmington, Del., which was general in scope and 100 percent effective. The strike made it impossible for the contractor and subcontractor to carry out the work under this contract owing to their inability to

> secure materials and supplies. No other form of transportation was available to the site of the work. It is computed that the delay to the contractor amounted to 5 days which was unforeseeable and beyond the control and without the fault or negligence of the contractor.
>
> It is understood and agreed that on account of the foregoing modification of said contract, five (5) days' additional time will be allowed.
>
> It is further understood and agreed that all other terms and conditions of said contract, as modified by Change Order No. 1, shall be and remain the same.

10. On April 26, 1937, plaintiff's president wrote Captain Burlin, assistant to the contracting officer, which letter reads, in part, as follows:

> We have not executed the change order for the reason that we believe there has been a further allowance of time in the amount of five or six days, which would bring the total extension to 28 or 29 days.
>
> We do not feel that we wish to accept the modification with the clause "It is further understood and agreed that all of the terms and conditions of said contract shall be and remain the same," therein. We wish to reserve the right to attempt to seek additional compensation due to this delay, if we so decide.
>
> If the above changes can be made in the modification, we will be glad to sign it.

The reply of Captain Burlin, under date of April 28, 1937, reads, in part, as follows:

> In reference to your exceptions to the paragraph contained in Change Order No. 1, viz: "It is further understood and agreed that all other terms and conditions of said contract shall be and remain the same," this paragraph is written into all change orders and refers to the contract as modified to date. It does not prevent the writing of an additional change order.
>
> In view of the above, the signing of Change Order No. 1 does not in any way prevent further extension of time if favorable action is taken. It is requested that you execute the change order and return it to this office promptly.

11. Plaintiff completed the contract work on April 8, 1937. On June 11, 1937, plaintiff wrote Captain Burlin a letter which set out an itemized statement of its claim on

account of fixed labor charges, rental of equipment, etc., in the sum of $5,987.98 for the 28 days of delay and this claim is supported by the evidence if the plaintiff is allowed for the full 28 days. If defendant is chargeable with only 23 days' delay, the evidence shows that the costs incurred by the plaintiff during such period were $4,918.69.

12. On April 6, 1937, plaintiff's president had a conference with Lt. Col. John Lee, at which conference Lt. Col. Lee informed him that he could not do anything about the matter of extra compensation for delay and that it was handled by others in Washington, D. C.

On May 26, 1937, plaintiff's president signed, without protest, a voucher for final payment under the contract, which voucher provided for the deduction from the final payment of the sum of $15, representing liquidating damages for one day's delay in the completion of the contract; and on June 11, 1937, plaintiff filed its claim for such costs. The contracting officer investigated the claim and made findings of fact to the effect that plaintiff had incurred extra costs amounting to $4,740.20, during said 23 days' delay, but disclaimed all responsibility for the costs incurred by plaintiff because of delay attributable to the truckmen's strike.

Plaintiff's claim was then forwarded by the War Department to the General Accounting Office, where it was disallowed on January 7, 1938.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

On November 10, 1936, the plaintiff entered into a contract with the defendant under the terms of which it agreed to furnish all labor and material and perform all work required for reinforcing the south pier of Summit Bridge over the Inland Waterway from the Delaware River to Chesapeake Bay, Delaware and Maryland, for the consideration of $41,783. Plaintiff's work under the contract was to be completed within 100 days from the date of receipt of written notice to proceed.

Article 19 of the contract provided in part as follows:

> ART. 19. (a) *Labor preferences.*—With respect to all persons employed on projects, except as otherwise pro-

vided in Regulation No. 2 (a), they shall be referred for assignment to such work by the United States Employment Service and (b) preference in employment shall be given to persons from the public relief rolls and, except with the specific authorization of the Works Progress Administration, at least ninety percent (90%) of the persons employed on any project, shall have been taken from the public relief rolls: *Provided, however,* That, expressly subject to the requirement of subdivision (b), the supervisory, administrative, and highly skilled workers on the project, as defined in the specifications, need not be so referred by the United States Employment Service.

Pursuant to notice received from the defendant, the plaintiff, on December 17, 1936, placed its equipment on the site of the work preparatory to beginning work. On December 16, 1936, the plaintiff made a request on the United States Employment Service for workmen and as the work proceeded continued to request workmen from the United States Employment Service, which was the office designated from which plaintiff was to receive its labor supply. But the United States Employment Service was not able to furnish sufficient qualified men to carry on the work and the necessary workmen could not be obtained in accordance with the terms of the contract. Part of this was caused by the dangerous nature of the work and part by other causes. The plaintiff attempted to get permission to use his own men on the work but did not succeed and in order to complete the contract was compelled to hire more than 10 percent of his labor from a source other than the United States Employment Service.

The contracting officer found that by reason of the failure of the United States Employment Service to furnish the necessary labor to complete the contract plaintiff was delayed 23 days in completing the work, and having so found, extended the time of plaintiff for completion of the contract accordingly. The plaintiff now seeks to recover damages on account of the delay. The defendant concedes the delay and also the amount of damage sustained which was found by the contracting officer, but says there has been no breach of the contract on its part, that it did not agree to furnish a sufficient supply of labor, and that there is nothing in the

contract providing that the contractor might recover damages in case of delay being caused by failure to furnish workers.

There is in fact no provision in the contract that defendant should furnish a sufficient supply of labor, and nothing is said therein with reference to the plaintiff being entitled to recover damages in case such a supply was not furnished. The nature of the contract, however, was such that we think it carried an implied agreement to furnish the men necessary to carry on the work. It must have been understood between plaintiff and the defendant's agents who prepared and executed the contract that plaintiff would be permitted in some way to obtain a sufficient force to carry on the work contemplated thereby. The provisions contained in the contract with reference to the source from which the plaintiff should obtain its workers surely were not understood by the parties to mean that if the workmen could not be so obtained the plaintiff would not be permitted to obtain the necessary workmen to complete the contract. Under any other construction, we would have in one part of the contract a provision that plaintiff must complete it within a certain time, and in another part a provision which meant that it could not be completed in event there was a shortage of workmen.

In *Black* v. *Woodrow*, 39 Md. 194, 215, it is said:

> It not infrequently occurs that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied. Thus, if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or things necessary for the completion of the contract will be necessarily implied.

This case is cited as authority for the principle laid down therein in 13 C. J., sec. 722, p. 649. We think the rule stated is a correct one and conclude that the contract in the case at bar carried an implied provision that the defendant would

furnish the necessary workmen to complete the work within the required time. It follows that by its failure so to do the defendant breached the contract and was liable in damages.

It is urged on the part of the defendant that the contract provided in substance that, except with the specific authorization of the Works Progress Administration, at least 90 percent of the persons employed should be taken from the public relief rolls. The plaintiff did not comply with this provision nor did it request the Works Progress Administrator to waive it. The evidence shows definitely that the plaintiff used every effort to obtain men from the source required by the contract and obtained all the workmen it possibly could in that manner. Apparently the officials of the Employment Service did what they could to aid in the matter, but they were unable to furnish the necessary workmen. The fact was that the men necessary to carry on the work could not be obtained in the manner required by the contract and plaintiff was compelled to go outside of its literal provisions in order to complete the work which it required.

It is urged on behalf of defendant that the contract provided in effect that the Works Progress Administration might waive this provision as to the source from which labor should be obtained but that plaintiff did not communicate with the Works Progress Administrator and ask that such a waiver be made. It is sufficient answer to the defense so set up, as we think, that such action would have been absolutely useless. The provision with reference to permission being given by the Works Progress Administration is quite peculiar and we think amounts to little or nothing because there was nothing that required the Works Progress Administration to give such permission or consent even though no laborers whatever could be obtained in the manner required by the contract. Moreover, the plaintiff violated no provision of the contract by not requesting specific authority from the Works Progress Administration, for the contract did not require it to so act. But if the plaintiff had requested such authority, it would have made no difference in the situation whether the Works Progress

Administration granted the request or not—the men were not available in any event and this action would not have changed the situation in the least. The parties to the contract knew this, the officials of the Employment Service knew it, and we must presume it was known also by the Works Progress Administration which, however, was not a party to the contract. Plaintiff's actions and conduct in the premises were entirely reasonable. It did everything it could to advance the progress of the work to early completion. It kept the contracting officer and the Employment Service fully advised of the situation and the plaintiff and the contracting officer conferred with the Employment Service with reference to its failure and apparent inability to secure and furnish the required workers under Art. 19 of the specifications, as shown in Finding 5. The plaintiff proposed to the Employment Service that, by reason of the fact a sufficient number of men had not been furnished, plaintiff secure and use its own men on the project, but the officials of the Employment Service declined to consider the proposition and told plaintiff to proceed with the men it had. After plaintiff had waited a reasonable time, carrying on the work in the meantime with the greatest possible dispatch, it employed other laborers in the completion of the work.

We think also that Art. 19 of the specifications with reference to a waiver of that provision by the Works Progress Administration had no reference to a case where the Employment Service did not or could not, within a reasonable time, furnish a sufficient number of laborers, but that provision, under the expressed and clearly intended provisions of the article, applied only in case the Employment Service could furnish and offered to furnish at least 90 percent of the persons employed on the project from public relief rolls. Plaintiff employed and used such persons as the Employment Service supplied and, in these circumstances, there was nothing for the Works Progress Administration to waive, and plaintiff was not required under the article to make any application to the Works Progress Administration.

The basis of plaintiff's action is the implied contract of defendant to furnish the workmen needed for the comple-

tion of the contract. Even if the contract implied that plaintiff should ask authority from the Works Progress Administration to employ workmen outside of the provisions thereof, we still think plaintiff's failure so to do is no answer to the claim which it makes that the contract was breached, because the making of such a request would have availed nothing, and we conclude there was a breach of the contract on the part of the defendant.

There is no dispute over the fact that the plaintiff was delayed 23 days by the failure to obtain the necessary workmen, nor is there any conflict as to the amount of its damages therefor which was practically agreed upon between plaintiff and the contracting officer. Plaintiff, however, asks damages for 5 days' additional delay caused by a truck drivers' strike and as a reason for this claim asserts that but for the delay caused by defendant failing to furnish the necessary workmen it would have finished the job before the strike took place. Conceding this to be the fact, we do not think it entitles the plaintiff to recover for this 5 days' delay. The defendant was not in any way responsible for the strike of the truck drivers. They were the direct cause of this 5 days' delay. This delay was not one which the defendant had any reason to anticipate and only indirectly was it connected therewith. We think that the plaintiff should be denied recovery on this item.

As a further defense the defendant sets up that the plaintiff executed a voucher for the final payment in accordance with the terms of the contract and is thereby barred from making any further claims against defendant. Some early decisions of this court are cited in support of this contention. On the other hand, counsel for plaintiff say that the cited cases do not support such a rule except where a release is signed which states in substance that nothing further is owing to the contractor, and that in the case at bar the plaintiff executed merely a receipt for payment in accordance with the contract. Recent decisions of this court are also cited as being contrary to the rule which defendant seeks to have applied. The evidence shows that when the extension of time for completing the contract was granted

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the plaintiff notified the contracting officer, through his assistant who was acting in the matter, that it would ask additional compensation on account of the delay. This notification was before the final voucher was signed and when the payment was made we think it was well understood between plaintiff and defendant that plaintiff would claim damages for the delay. We are clear that under the circumstances of the case plaintiff was not barred from recovering damages for the delay on account of the signing of the voucher.

The evidence shows that the plaintiff was damaged by the delay to the extent of $4,918.69 which it is entitled to recover. Judgment is rendered accordingly.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

HARRIS TRUST AND SAVINGS BANK AND JENNIE L. FAY, EXECUTORS OF THE ESTATE OF ALBERT R. FAY, DECEASED, v. THE UNITED STATES

[No. 43188. Decided November 6, 1939. Plaintiffs' motion for new trial overruled February 5, 1940]*

On the Proofs

Estate tax; trust executed in contemplation of death.—Where decedent in 1926 or 1927, when in good health, contemplated the creation of an irrevocable trust to manage his estate, but did not execute the trust deed until 1930, after he had developed a heart trouble, it is held that the trust was created in contemplation of death, although he did not die until 1933, and the heart trouble which caused his death was unconnected with the trouble from which he had previously suffered.

Same.—If illness was inducing motive for creation of trust, such trust was created "in contemplation of death," for estate tax purposes, notwithstanding that one of the motives for creation was consistent with thoughts of life.

*Certiorari denied May 20, 1940.

The Reporter's statement of the case:

Mr. Albert H. Veeder for the plaintiffs. *Messrs. Francis E. Baldwin* and *Henry Veeder* were on the briefs.

Mr. J. H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the briefs.

This is a suit to recover additional estate taxes assessed by the Commissioner against the estate of the plaintiffs' testator, resulting from the inclusion in his gross estate of the value of property included in a trust instrument executed by the decedent more than two years prior to his death, on the theory that the trust was executed in contemplation of death.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff, Harris Trust & Savings Bank, is a corporation of the State of Illinois, engaged in business as a bank and trust company, with its principal place of business in the City of Chicago, State of Illinois, and plaintiff, Jennie L. Fay, is a citizen of the United States. Plaintiffs are the executors of the Estate of Albert R. Fay, deceased.

2. The decedent, Albert R. Fay, died at the age of 73 years on January 22, 1933, a resident of Chicago. His last will and testament was duly admitted to probate in the Probate Court of Cook County, Illinois, on February 14, 1933, and letters testamentary were thereupon issued to Harris Trust & Savings Bank and Jennie L. Fay.

3. The decedent, Albert R. Fay, and said plaintiffs have at all times borne true allegiance to the Government of the United States, and have not taken part in, aided, abetted, or given encouragement to rebellion or insurrection against the Government of the United States.

4. The plaintiffs are and always have been the sole and absolute owners of the claim presented in this litigation, and have made no transfer or assignment of said claim, or of any part thereof or interest therein, and no action upon

said claim, other than this litigation, has been had before Congress or any of the Departments of the United States Government.

5. Decedent was employed by Swift & Company for about 45 years, and for many years prior to his retirement therefrom was its traffic manager. He retired from Swift & Company in 1926 or 1927. At the time of his retirement and for about one year thereafter he was vice president of South Side Trust & Savings Bank of Chicago. At the time of his death, decedent was a large stockholder and a director of City Ice & Fuel Company and a number of other corporations.

6. In 1926 or 1927 the decedent discussed with members of his family and with others, including his lawyers, the creation of a trust for the disposition of about one-half of his property. He declared his purpose in so doing to be, in part, to relieve himself of the burden of handling this portion of his estate, and to insure an income for himself and family during his life and, in part, to put the management of it after his death in hands he considered more capable than those of his wife and daughter, and thus insure to them an income after his death. However, he did not create a trust at this time, nor until June 12, 1930. During this period he was spending about one-half of his time away from his headquarters, principally in California in the winter and in Michigan in the summer.

7. Upon decedent's retirement in 1926 or 1927 he continued his private business activities, devoting the mornings to his work, and about three afternoons in the week to golf. Except for occasional minor ailments he enjoyed good health until about the year 1930.

He spent the winter of 1929–1930 in California. While there he consulted physicians, who advised him that he had arteriosclerosis and myocardial degeneration.

Upon his return to Chicago in March 1930 he consulted his family physician, who confirmed this diagnosis. This physician found that decedent had a much enlarged heart, with two murmurs, a marked weakness of heart action, and marked lowering of blood pressure. He prescribed

that the decedent entirely forego any athletic activities, and that he remain absolutely in bed for six weeks. He was even prohibited from going to the bathroom. After the expiration of this six weeks, sometime in May 1930, he was allowed to be up with gradually increasing activities. After another period of from four to six weeks these restrictions were largely removed, and in June 1930 decedent was permitted to go to his summer home in Michigan, where he resumed the playing of golf, almost daily. Before going to Michigan, however, he secured from his physician in Chicago the name of a physician in his summer home, Wequetonsing, Michigan, whom he might consult if necessary. He did consult this physician on July 6, 1930, and at subsequent times during the summer. He did not inform this physician of his heart trouble, nor was he examined therefor except superficially. No such trouble was found as a result of this examination.

Decedent did not follow strictly the instructions of his family physician in Chicago, and did not seem concerned about his physical condition; but, on the contrary, he appeared to believe that there was nothing seriously wrong with him.

Myocardial degeneration is a curable disease, and the fact that he was suffering therefrom and from arteriosclerosis was not sufficient to cause decedent reasonably to believe that death would probably ensue therefrom.

Later in the year 1930 the decedent developed angina pectoris, but there was no indication of this disease or that it might develop when decedent was put to bed in March 1930, or at the time he executed the trust instrument in question.

The decedent died of angina pectoris on January 22, 1933.

8. Shortly after he was permitted to get up from bed and while still under the care of his physician, decedent resumed his consultations with his lawyers relative to the creation of the trust, later executed on June 12, 1930. To his attorney he represented that he had a variety of bonds and municipal securities that he desired placed in a trust; that he did not have the time to devote to their administra-

tion, to keep track of the interest payments and substitutions that should be made from time to time and that he desired to pass that burden on to somebody who had the necessary statistical facilities.

9. The conditions of the trust were finally determined upon and embodied in the instrument. That instrument, executed by the decedent as donor June 12, 1930, was an irrevocable trust agreement, with Chicago Title & Trust Company as trustee, and provided for the transfer, in trust, of numerous municipal bonds of the aggregate par or face value of approximately $850,000 and for the payment of the net income from the trust to the donor during his lifetime, and, after his death and during the lifetime of Jennie L. Fay, wife of the donor, and as long as she should live, to Jennie L. Fay, and after the death of the donor and his wife, and during the lifetime of Helen Fay Hunter and so long as she should live, to Helen Fay Hunter; and provided, further, that upon the death of the last survivor of the donor, his wife and his daughter, the trust created by said agreement should terminate, and the principal thereof and all undistributed income therefrom should be distributed among the surviving issue, if any, of Helen Fay Hunter in such proportions and amounts as she, by deed or by her last will, should appoint under Clause 11 of the trust agreement, and in the event of her failure to exercise the power of appointment, then to and among her issue in proportions and amounts as the survivor of the donor and his wife, by deed or will, should have appointed under Clause 11; and, in the event at the termination of the trust no power of appointment, as aforesaid, should have been effectively exercised, the remainder of the trust estate should at that time be transferred, paid over and delivered to and among the surviving issue, if any, of the donor's daughter, and the issue of deceased issue, in equal parts *per stirpes*, and in the event that at the termination of the trust, as aforesaid, no lawful issue of the donor's daughter should be surviving, the entire corpus thereof, distributable as aforesaid, should be transferred, paid over and delivered to Garrett Biblical Institute, a corporation of the State of Illinois, upon certain terms and conditions set forth in Clause 11.

The value of the property included in the trust instrument was substantially equal to the property remaining in decedent's hands at the time of his death.

10. Up to the time of the execution of this trust June 12, 1930, the decedent in 1913 had given his wife 2,000 shares of Swift & Company stock of the par value of $100 per share. In April 1925, decedent gave his daughter $15,000 par value of Toledo, St. Louis & Western Railroad bonds, $20,000 par value of Livingston Baking Company bonds, and 200 shares of Swift & Company stock of the par value of $100 per share, and on November 14, 1929, the decedent placed in an irrevocable trust for the benefit of his daughter during her lifetime or until she should attain the age of 50 years, 30,000 shares of no par value common stock of City Ice & Fuel Company. Decedent for many years prior to June 12, 1930 had given to Garrett Biblical Institute, a theological seminary, of which decedent was a director (trustee), about $4,500 a year.

The above trust created for the benefit of the daughter produced an income to her of about $9,000 per year, and the other gifts gave her an annual income of about $5,000, a total of $14,000.

11. On January 25, 1934, plaintiffs in accordance with the provisions of the Revenue Act of 1926, as amended by the Revenue Act of 1932, filed in the office of the Collector of Internal Revenue a Federal estate tax return for the estate of the decedent, showing a tax liability of $53,413.63.

12. On December 29, 1933, plaintiffs as executors paid to the Collector of Internal Revenue, on account of this tax, $25,000, and on January 20, 1934, paid the Collector an additional sum of $28,413.63, being the remainder of the Federal estate tax shown to be due by the return.

13. On September 27, 1934, a letter was sent to the plaintiffs by the Internal Revenue Agent in Charge at Chicago, Illinois, notifying plaintiffs of certain proposed changes in the return and proposing, among other things, to include the value, as of the date of decedent's death, of the bonds constituting the corpus of the trust held under the agreement of June 12, 1930, as a part of the assets of the gross estate of the decedent.

14. On November 8, 1934, the plaintiffs paid to the Collector $15,000, to be applied and credited upon such additional estate tax as might thereafter be properly assessed upon the estate, and on April 10, 1935, paid to the Collector $715.07, which the Collector had demanded as interest from January 2, 1934, to November 8, 1934.

15. On March 6, 1935, the Commissioner of Internal Revenue sent a letter to the plaintiffs proposing an assessment of deficiency in Federal estate tax of $81,638.39, after allowing credit for the payments of $25,000, $28,413.63, and $15,000.

16. The letter of March 6, 1935, included for taxation, under Section 302 (c) of the Revenue Act of 1926, as amended, "as a transfer to take effect in possession or enjoyment at or after death," the value of the property held by Chicago Title & Trust Company under the trust agreement of June 12, 1930.

Upon receipt of this letter the plaintiffs filed a waiver of their right to appeal to the Board of Tax Appeals and permitted the Commissioner to make an immediate assessment, and the additional tax was assessed.

17. A notice and demand, dated July 8, 1935, was sent to the plaintiffs by the Collector for additional Federal estate tax assessed against the Estate of Albert R. Fay, deceased, in the sum of $81,638.39, together with interest thereon from January 22, 1934, to June 7, 1935, in the sum of $6,723.42, the same being a total of additional tax and interest amounting to $88,361.81, which was paid August 6, 1935.

18. On September 21, 1935, plaintiffs filed with the Collector a claim for refund of $95,207.92, set forth therein as tax overpaid $88,172.98, and interest overpaid $7,034.94, the ground for refund being therein stated as follows:

> The inclusion in decedent's gross estate for Federal Estate Tax purposes of the property constituting the trust estate held under said agreement dated June 12, 1930, and the imposition of a Federal Estate Tax thereon are the result of an unconstitutional construction and the application retroactively of Section 302 (c) of the Revenue Act of 1926, as amended, to said irrevocable transfer in trust by agreement dated June 12, 1930, between the decedent and Chicago Title and Trust Company.

The claim for refund was rejected October 31, 1935, and it has not been paid.

18 (a) If the property conveyed by the trust instrument, the provisions of which are summarized in Finding 9, were improperly included as a part of decedent's gross estate for Federal Estate Tax purposes, the plaintiffs would be entitled to a refund of $715.07, with interest at 6 percent from April 10, 1935, plus $4,558.30, with interest at 6 percent from November 8, 1934, plus $88,361.81, with interest at 6 percent from August 6, 1935.

19. The trust agreement of June 12, 1930, was made in contemplation of death.

The court decided that the plaintiffs were not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The question here involved is whether or not a certain trust executed by the decedent on June 12, 1930, was executed in contemplation of death, in the sense that phrase is used in Section 302 (c) of the Revenue Act of 1926. (44 Stat. 9, 70; 26 U. S. C. A. 411 (c); I. R. C., Sec. 811, p. 121.)

On this date of June 12, 1930, the decedent executed an irrevocable trust to the Chicago Title and Trust Company, as trustee, providing for the transfer to it, in trust, of municipal bonds of the approximate face value of $850,000. This was approximately equal to the value of the property remaining in the decedent's hands at the time of his death.

At the time of the execution of the trust the decedent was about 70 years of age and was suffering from arteriosclerosis and myocardial degeneration. He died on January 22, 1933, about two years and six months after the execution of the trust, from angina pectoris. At the time of the execution of the trust instrument there were no symptoms of this disease.

Upon discovering that decedent was suffering from arteriosclerosis and myocardial degeneration, his physician put him to bed and allowed him to take no exercise whatever, not even to the extent of going to the bathroom. He was so confined for six weeks. After the lapse of this time he was

permitted to get up and gradually increase his physical activities, and after several weeks more he was permitted to go to his summer home in Wequetonsing, Michigan, and to resume the playing of golf, of which he was very fond.

The trust was executed while the decedent was under the care of his physician, but apparently after the first six weeks of absolute quiet.

Although his physician had prescribed such a complete cessation of physical activity, the decedent, to all outward appearances, at any rate, was not at all alarmed about his physical condition; but, on the contrary, treated it lightly, and insisted that it was foolish for him to be put to bed.

Myocardial degeneration is a curable disease. The treatment for it is complete rest.

The execution of this trust was not first conceived while the decedent was confined to his bed in 1930, but had been previously discussed by him with members of his family, his lawyers, and others as far back as 1926 or 1927, at a time when he was in good health.

In 1926 or 1927 his declared motive for contemplating the execution of a trust instrument was twofold. It was, first, in order to relieve himself of the burden of keeping track of his securities, and to insure an income for himself and family during his lifetime. Secondly, it was for the purpose of putting the management of his property after his death in the hands of those whom he considered more capable than his wife and daughter, and thus to insure an income for them after his death.

When he actually executed the trust the only reason he assigned for doing so was that he desired to shift from himself to others who had the necessary statistical facilities the burden of keeping track of the interest payments and the substitutions that should be made from time to time. No doubt he was actuated in part also by the motive expressed by him in 1926 or 1927, which was to put the management of his property after his death in the hands of those he considered more capable than his wife and daughter, and to insure for them an income after his death. Not only is this a fair inference from the fact he had had such a motive when he had previously contemplated such a trust, but also from the fact that the instrument executed accomplished this purpose.

These are the essential evidentiary facts from which the ultimate fact and conclusion must be drawn.

This case is not free from doubt, but after careful consideration we conclude that the thought of death was the impelling motive for the creation of the trust. We are driven to this conclusion by these considerations: In 1926 or 1927 the decedent, when in good health, contemplated the creation of a trust such as he later executed. At that time he was actuated by two motives. One was to relieve himself of the burden of administering his securities, of determining when to discard some and to substitute others, etc. This motive was not induced by thoughts of death. The other was to put his property in the hands of those whom he considered more competent to handle it after his death than his wife and daughter. This motive was induced by thoughts of death. Which was then the dominant or controlling motive, we do not know.

Both motives combined, however, were not sufficient to induce him at that time to carry out his contemplated plan. He did nothing about it for three or four years and not until he had developed a heart disease, which necessitated absolute physical inactivity, even to the extent of not getting out of bed to go to the bathroom. He was in bed with this disease for six weeks. Shortly after getting up, on a regimen of restricted activity, he executed the trust contemplated three or four years before. He took action only when he had developed a heart trouble, not necessarily fatal, but which had condemned him to a six-weeks' period of absolute physical inactivity.

This action is inconsistent with the idea that he treated lightly his ailment. In our opinion the thought that tipped the scales and finally induced him to do the thing he had been contemplating for three or four years was this heart trouble.

The fact that he died from a heart trouble unconnected with the one from which he was then suffering seems to us immaterial. The material consideration is the effect created on decedent's mind by the heart trouble with which he was then suffering. This we believe was the inducing motive for the creation of the trust. If so, under the au-

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thority of *Wells* v. *United States*, 69 C. Cls. 485, 283 U. S. 102, and *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48, the trust must be held to have been created in contemplation of death. And this is true, we think, notwithstanding the fact that one of his motives was consistent with thoughts of life, because the motive that impelled him at the time, the dominant motive, was one induced by the precarious condition of his health.

Plaintiffs are not entitled to recover, and the petition is therefore dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

THE ISMERT-HINCKE MILLING COMPANY v. THE UNITED STATES

[No. 43885. Decided November 6, 1939. Defendant's motion for new trial overruled February 5, 1940]

On the Proofs

Government contract; nonpayment of processing tax.—Where plaintiff entered into contracts with the Government to supply, and did supply, flour at a unit price per pound, and where such contracts contained a provision that the price set forth therein "included any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract," the plaintiff being the processor of the wheat from which the flour was manufactured but did not pay the processing tax thereon, it is held that in receiving the price stipulated in the contract the plaintiff was not overpaid by the defendant in the amount of the processing taxes on the flour.

Same; consideration.—Payment of the processing tax was not a part of the consideration.

Same; reimbursement.—Provisions of the contract which state conditions under which the price may be increased or diminished provide no basis for an implication that the tax would be reimbursed under other and different circumstances.

Same; tax absorbed.—Where there is but one price fixed by the contract and no separation of the tax, it is held that the tax has been absorbed in the price and that the purchaser merely pays the price demanded.

Same; refund of tax not stipulated.—In the instant case, the contracts contained no provision that the amount of the tax should be refunded to the defendant in event the tax was held unconstitutional or invalid, or for any other reason was not paid by the plaintiff, and it is held that the grounds for any change in the price were stated clearly and without ambiguity, leaving nothing to be inferred or implied.

Same; Government as a party immaterial.—That the Government was a party to the contracts in suit does not alter the case; the fact that the defendant would have received the tax if it had been paid is entirely immaterial.

The Reporter's statement of the case:

Mr. Phil D. Morelock for the plaintiff. *Morelock & Lamb* were on the briefs.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, upon the stipulation of the parties:

1. Plaintiff is a corporation organized and existing under the laws of the State of Kansas, with its principal office in Kansas City, Missouri, and at all times mentioned herein was engaged in the business of manufacturing flour and related products from wheat for sale to various buyers, including the United States.

2. After January 6, 1936, plaintiff entered into a contract with the United States Department of Agriculture, Bureau of Entomology and Plant Quarantine, under Purchase Order No. 24, dated June 25, 1936, by the terms of which it agreed to sell to the United States 150 tons of wheat bran at $21.00 per ton, F. O. B. Kansas City, Missouri, or at a total price of $3,150.00, and the United States agreed to pay therefor said sum of $3,150.00. The supplies were furnished and delivered by plaintiff to defendant, accepted and approved by defendant, and proper Bureau Voucher (No. 148) in the amount of $3,150.00 was issued and forwarded to the General Accounting Office for pre-audit before payment. Payment of the $3,150.00 was withheld by the Comptroller General, who, on February 20, 1937, issued his Notice of Settlement of Claim of the General

Accounting Office (Certificate No. 0436693, Claim No. 0580082 (4)) in which he certified that $3,150.00 was due the plaintiff under such contract but had been credited by him against an alleged indebtedness of a larger amount on account of an alleged overpayment made by defendant to plaintiff under certain other contracts referred to in Findings 3 and 5 hereof.

Plaintiff also entered into a contract, dated March 19, 1936, with the United States Veterans' Administration (Contract No. V A s-2097), by the terms of which it agreed to sell to the United States a total of 3,500 barrels of hard wheat flour at $4.69 per barrel, F. O. B. Kansas City, Missouri, or at a total price of $16,415.00, and the United States agreed to pay therefor $16,415.00. The flour was furnished and delivered by plaintiff, accepted and approved by defendant, and proper Bureau Vouchers (Nos. 55898 and 55899) in the amount of $16,415.00 were issued and forwarded to the General Accounting Office for preaudit before payment. Payment of the $16,415.00 was withheld by the Comptroller General who, on February 4, 1937, issued his Notice of Settlement of Claim of the General Accounting Office (Certificate No. 0435125, Claim No. 0580082) in which he certified that $16,415.00 was due to plaintiff under the contract but had been credited by him against an alleged indebtedness of a larger amount on account of alleged overpayments made by defendant to plaintiff under certain other contracts referred to in Findings 3 and 5 hereof.

3. During the period from May 1935 to January 6, 1936, plaintiff entered into a number of contracts with the United States, by the terms of which it agreed to sell to the United States and the United States agreed to buy a total of 4,440,000 pounds of flour. There follows an excerpt from one of the aforementioned contracts between the plaintiff and the defendant which is typical of the price provision contained in all of the aforementioned contracts and that contained in all of the invoices issued to the defendant by the plaintiff covering the contracts:

Item	Pounds (about)	Unit Price (per pound)	Total contract price
lb. Flour, wheat, in sacks, Type A	200,000	.0324	$6480.00

Each of the contracts also contained the following clause:

> Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items.

Plaintiff made delivery of all the flour provided for in the contracts, same was accepted by defendant, and the defendant paid to plaintiff the bid or contract price therefor.

Plaintiff was the processor of the wheat from which the flour was manufactured, and, along with other first domestic processors, during the period from May 1935 to January 6, 1936, applied to and obtained from the United States District Court for the District of Kansas an injunction against the Collector of Internal Revenue prohibiting the collection from it of any processing taxes so that no processing taxes were paid by the plaintiff on the processing of wheat used in the manufacture of the flour delivered to the defendant.

4. Prior to the execution of the contracts mentioned in Finding 3 hereof, the Secretary of Agriculture, in accordance with the authority vested in him by the provisions of the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31), as amended, had, by Wheat Regulations approved by the President, established the rate of processing tax imposed on the first domestic processing of wheat and the conversion factor necessary to determine the processing tax imposed upon a particular product manufactured from wheat. Under such regulations the tax was fixed at 30 cents per bushel on all wheat processed, and the conversion factor applicable to flour was fixed at .00704 cents per pound.

Opinion of the Court

5. The identification of the contracts referred to in Finding 3 hereof and the defendant's computation of the amount of the processing taxes which the defendant alleges were included in the contract price of the flour delivered to the defendant by the plaintiff at the rate of .00704 cents per pound of flour follows:

Contract No.	Amount of Process Tax
Jlo-3364	$4,073.29
W-199-qm-12710	12,259.85
W-199-qm-12386	603.68
W-199-qm-12331	1,228.06
VAs-1790	558.84
W-199-qm-13027	12,533.78
Total	31,257.50

As heretofore shown, there was certified due the plaintiff in settlement No. 0436693 the sum of $3,150.00, and that amount was credited by the Comptroller General to plaintiff's alleged indebtedness of $4,073.29 under contract No. Jlo-3364.

As heretofore shown, there was certified due the plaintiff in settlement No. 0435125 the sum of $16,415.00, and $12,259.85 thereof was credited to the plaintiff's alleged indebtedness of $12,259.85 under contract No. W-199-qm-12710, and the remaining $4,155.15 thereof was credited to plaintiff's alleged indebtedness as follows: $603.68 thereof was applied under contract No. W-199-qm-12386; $1,228.06 thereof was applied under contract No. W-199-qm-12331; $558.84 thereof was applied under contract No. VAs-1790, and $1,764.57 thereof was applied under contract No. W-199-qm-13027.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This is a suit upon two contracts for the recovery of the total amount of $19,565 for supplies furnished to the defendant. These contracts were fully performed and the amounts sued for have been duly allowed by the Comptroller General. The controversy in the case arises by reason of the Comptroller General having credited the amount admitted to be due on these two contracts against an alleged indebtedness of a larger amount on account of overpayments

claimed to have been made by defendant to plaintiff on certain other contracts.

It appears that during the period when the Agricultural Adjustment Act was in force plaintiff entered into six other contracts with the defendant for the purchase of 4,440,000 pounds of flour at a unit price per pound. The contracts provided that the price set forth therein included "any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract." The amount of processing taxes thus included in the contract price of the flour under these contracts was $31,257.50. Plaintiff made delivery of the flour and defendant paid plaintiff the full amount of the contract prices. Plaintiff was the processor of the wheat from which the flour was manufactured but did not pay the processing taxes thereon, having obtained an injunction against the collector of internal revenue prohibiting the collection of such taxes. The sole issue in the case is whether under the facts above stated the plaintiff has been overpaid by defendant in the amount of the processing taxes on the flour so sold.

The defendant relies in part on the provision contained in the contracts as follows:

> If any sales tax, processing tax, * * * or charges are imposed or changed by the Congress after the date set for the opening of the bid * * *, and are paid to the Government by the contractor * * *, then the prices named in this contract will be increased or decreased accordingly, * * *.

and argues that this language shows that the intent of Congress was that plaintiff should reimburse the defendant in case plaintiff did not pay the tax.

It is also contended that under the contracts the defendant paid the processing tax as part of the consideration and that if it is not permitted to recover the amount so paid, there would be a failure of consideration to that extent.

The question of law involved in the case has a number of times been before the court and the weight of authority is decidedly against the contention of the defendant.

In *Continental Baking Co.* v. *Suckow Milling Co.*, 101 Fed. (2d) 337, a leading case on the subject, it appeared that

the plaintiff had entered into written contracts for the purchase of flour from the defendant. The plaintiff alleged that it had paid to the defendant $13,326.40 as the amount of processing taxes on the wheat that went into the flour purchased and that the item of tax was included in the price named in the contract in addition to the regular price of the flour. The defendant, however, resisted the payment of the tax and, it having been held invalid, did not pay it. Based on these facts, the plaintiff sued to recover the amount of the processing taxes which was included in the price paid for the flour. The defense was that the processing taxes did not appear as a separate item in the contracts which named only one price and by reason thereof the tax was absorbed in the price paid for the flour. Attention is also called by the court to the fact that there was no provision for refund in event the processing tax should be annulled.

The opinion of the court in the case above cited considered a large number of cases involving the question of the right of the purchaser to recover the amount of the tax under circumstances similar, or nearly similar, and held in effect that there could be no recovery where the tax was absorbed in the price and was not a separate item thereof.

Among other cases the court cited that of *Johnson* v. *Igleheart Bros., Inc.*, 95 Fed. (2d) 4, where the purchaser, as in the case now before us, contended there was an implied promise arising from the contract to refund the taxes which had been included in the purchase price and not paid. Further on in the opinion a large number of cases are cited where relief had been denied on the ground that the tax item was absorbed in a composite price paid by the purchaser. The basis of these decisions was said to be "the theory that where the tax has been absorbed in the price, the purchaser does not pay the tax but merely the price demanded for the goods, and that his rights being based solely on the contract, are controlled by the law of contracts." The court further stated in effect that the cases cited show tax absorption when "there is only one price shown on the contract [and] there is no separate invoicing of the tax." Accordingly the Circuit Court of Appeals in

the *Continental Baking Co. case*, *supra*, dismissed the action of the plaintiff stating, among other things, as a reason for its decision that—

> The contract does not contain any provision for the refund of any part of the purchase price in the event the processing tax should be annulled,

and that

> plaintiff did not pay two separate funds to the defendant, namely, a fund for the flour and fund for the tax, but on the contrary, * * * there was but one price named in each of the contracts.

It will be observed that the same condition existed in the case at bar.

Counsel for defendant call attention to the clause in the contracts under consideration which provides that prices named in each contract will be increased or decreased if the processing tax is "changed by the Congress after the date set for the opening of the bid * * * and are [is] paid to the Government by the contractor," and argue that this provision implies a promise on the part of the contractor to reimburse the Government where the taxes were included in the purchase price but not paid by the contractor.

We have not observed any case in which the contract involved contained a provision exactly similar to the one under consideration in the case before us. There are, however, several cases holding that the terms of the contract which state the conditions under which the price may be increased or diminished provide no basis for an implication that the tax would be reimbursed under other and different circumstances. Among these cases are *Continental Baking Co.*, *supra; Johnson* v. *Igleheart Bros.*, *supra;* and *O'Connor-Bills, Inc.*, v. *Washburn Crosby Co.*, 20 Fed. Supp. 460.

It is also argued on behalf of the defendant that by reason of plaintiff having failed to pay the processing taxes involved in the six completed contracts there was a want of consideration for the payments made thereon to that extent, and that the plaintiff having been paid in full, the Comptroller General rightfully held that there had been an

overpayment upon which the amount due on the contracts on which plaintiff brought suit could be credited. But this contention is negatived by the authorities which hold that where there is but one price fixed by the contract and no separation of the tax, the tax has been absorbed in the price and that the purchaser merely pays the price demanded for the goods. In such cases there can be no implication outside of the terms of the contract. It should be kept in mind in this connection that the contracts upon which suit was brought contained no provision that the amount of the tax should be refunded to the defendant in event the tax was held unconstitutional or invalid, or for any other reason was not paid by the plaintiff. The grounds for any change in the price were stated clearly and without ambiguity, leaving nothing to be inferred or implied. While some verbal differences may be found in the terms of the contracts involved in the cases cited to support plaintiff's contentions, these differences do not affect the principle laid down therein or the rules which determine defendant's right to recover.

The only case to which our attention has been called as laying down a different rule from what has been stated above is that of *Cream of Wheat Corp.* v. *Moundridge Milling Co.*, 24 Fed. Supp. 998, and this was reversed on appeal in *Moundridge Milling Co.* v. *Cream of Wheat Corp.*, 105 Fed. (2d) 366. The opinion delivered by the circuit court is in line with the other cases we have cited and, although the contract provided that a decrease or abatement in taxes should be deducted from the contract price, the seller was not required to refund taxes which were adjudged to be unconstitutional.

It seems to be considered by the attorneys for the defendant that the fact that the Government was a party to the contracts in suit makes the rule we have laid down above inapplicable, and as a basis for the argument made by defendant it is said that in private contracts it is immaterial to the vendee whether the taxes are paid or not. With this statement we do not agree. In all of the cases which we have cited the foundation on which the action was laid was that the tax had not been paid. In our opinion, the fact

that the defendant in the case at bar would have received the tax if it had been paid is entirely immaterial.

Our conclusion is that there was in fact no overpayment made by defendant in the settlement of the six flour contracts. The Comptroller General therefore had no right to apply the amount due on the two contracts upon which suit was brought on the alleged indebtedness. Judgment will be rendered in favor of the plaintiff as prayed in the petition.

WHITAKER, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

LEHIGH PORTLAND CEMENT CO. v. THE UNITED STATES

[Nos. 41974 and 42116. Decided December 4, 1939]

On the Proofs

Income and profits tax; premature assessment of deficiencies before expiration of 60-day limit.—Where assessment of deficiencies in income tax for 1918 and 1920 (such assessment not being a jeopardy assessment) were made before expiration of 60 days after the mailing of a deficiency notice under section 274 (a) of the Revenue Act of 1926, but no demand was made on the taxpayer within the 60-day period, and where the taxpayer did not contest the assessment nor seek to enjoin collection on the ground that the assessment was premature, and where after expiration of the 60-day period, collector mailed to the taxpayer notice and demand for payment, and where the taxpayer paid the assessed tax before expiration of statutory period of limitations, without specific objection to the assessment as being premature or void, the fact that the assessment was premature does not entitle taxpayer to recover the payments made nor overpayment for 1919 credited in part satisfaction of the deficiency assessed for 1918.

Same.—An assessment which was premature under the provisions of section 274 (a) of the Revenue Act of 1926, because made before the expiration of 60 days after the mailing of a deficiency notice, was not thereby void.

Same.—The assessment of a tax which was premature under the provisions of section 274 (a) of the Revenue Act of 1926 was not void and collection thereon was not an illegal and void exaction, where plaintiff took no action to enjoin the making of the assessment, as provided for in the act.

Syllabus

Same.—Where after the tax had been prematurely assessed, no steps were taken by plaintiff to enjoin action thereon by the collector, it is held that plaintiff was in no wise prejudiced by the assessment and collection.

Same.—Where no action was taken by the collector to collect the deficiencies until after the expiration of the 60-day period following the mailing of the deficiency notice within which plaintiff might file a petition with the Board of Tax Appeals; where no lien was placed upon any property of the plaintiff because of such assessment, and where no distraint proceeding was begun by the collector, it is held that plaintiff was likewise not prejudiced.

Same; remedy specific.—The provisions of section 274 and other provisions of the Revenue Act of 1926 with reference to assessment and collection evidence a clear purpose to limit the taxpayer, if he desires to object to a premature assessment or collection, to the specific remedy provided in section 274 (a) if timely invoked, and are inconsistent with the theory that timely action by injunction may be waived and suit thereafter brought to recover the tax solely on the ground that it was prematurely assessed, paid, or collected.

Same; injunction barred.—The remedy by injunction provided by section 274 (a) as an exception to provisions of section 3224 of the Revised Statutes becomes barred upon the expiration of 60 days after the mailing of the deficiency notice if no petition is filed with the Board of Tax Appeals; and if a petition is filed with the Board, a proceeding to enjoin collection of a deficiency becomes barred on the date the decision of the Board becomes final in a case in which either party may appeal to the Circuit Court of Appeals.

Same.—Where an assessment prematurely made is not questioned in the manner specified in section 274 (a) and payment is otherwise timely and legally demanded, such assessment and collection cannot be enjoined under the positive provisions of section 3224, R. S.

Same; appeal to Board of Tax Appeals.—Taxpayer may not recover the tax so paid or collected, if he has not appealed to the Board, unless he subsequently files a proper claim for refund and shows that the tax has in fact been overpaid.

Same; premature assessment valid.—A premature assessment becomes valid for the purpose of collection, if taxpayer has not filed a timely appeal to the Board; or if having filed such appeal, the decision of the Board has become final; or if the time has arrived when the Commissioner might make a timely and valid assessment and collection.

Same; error or irregularity.—An error or irregularity as to the procedure or time of making an assessment will not render it void.

Reporter's Statement of the Case

Same; specific remedy.—Where Congress has given the taxpayer a specific remedy, that remedy cannot be extended beyond the period for which it was provided; nor, if it is not invoked, can it be later converted into a suit to recover the tax.

Same; injunctive remedy exclusive.—So far as concerns a premature assessment or an attempted collection before the date on which assessment and collection are authorized under the provisions of sections 274 and 1001 (c), the injunctive remedy given to the taxpayer by section 274 (a) is exclusive.

Same; timely collection.—A timely collection, although on a premature assessment, is not thereby void.

Same; waiver of statutory remedy.—A statutory provision may be waived by one for whose benefit it was intended; such waiver may be accomplished by failure timely to invoke the remedy or by an express consent.

Same.—Where the tax was paid after the expiration of the 60-day period following the mailing of the deficiency notice (no petition having been filed with the Board) and notice and demand for payment of the deficiencies was not given until after the expiration of such period; the original statutory period of limitation having expired before the deficiency notice was mailed and before the premature assessment was made, it is held that the waivers of the statute of limitation filed by the plaintiff were not rendered ineffectual by the premature assessment.

Same; construction of statute.—A statute must be construed with reference to its objects and the statutory provisions with reference to determination, appeal, assessment and collection must be read into a waiver extending the limitation period.

The Reporter's statement of the case:

Mr. Francis R. Lash, for the plaintiff. *Messrs. Speer* and *Otto* were on the brief.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

In these two cases plaintiff seeks to recover income and profits taxes in the principal sum of $402,397.79 paid for the fiscal taxable years ending November 30, 1918, 1919, and 1920, together with interest of about $286,827, or a total of $689,224.79. Of this tax and interest the amount of $337,973.89 represents the tax and interest paid for 1918 and 1920 in the respective amounts of $130,435.95 and $207,-537.94; the remainder of $64,423.90 represents an overpay-

ment for 1919 credited against the deficiency for 1918. In its petition in case No. 41974 plaintiff makes claim on the basis of an account stated for the overpayment of $64,423.90 for 1919 plus interest of $21,517.58, totaling $85,941.48 which account is alleged to have been stated by the Commissioner of Internal Revenue August 20, 1926.

In the petition in case No. 42116, subsequently filed, plaintiff makes claim for this overpayment of $64,423.90 for 1919 and also for the deficiencies above-mentioned paid for 1918 and 1920.

The sole ground on which plaintiff seeks to recover the deficiencies paid for 1918 and 1920 and the overpayment for 1919 credited against the tax determined to be due for 1918 is that the tax for 1918 and for 1920 was prematurely assessed and that the credit was made and the deficiencies were paid before collection thereof could be enforced under the statute. Plaintiff contends that the assessment of deficiencies for 1918 and 1920 (such assessment not being a jeopardy assessment) before the expiration of sixty days after the mailing of a deficiency notice under section 274 (a), Revenue Act of 1926, was void and of no effect, and that the credit of the overpayment for 1919 against the 1918 deficiency and the payment on July 17, 1926, of the balance of the deficiencies for 1918 and 1920 upon receipt of notice and demand therefor from the collector were likewise illegal and void and may be recovered as erroneous and illegal collections for those years because of the alleged void assessment.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Pursuant to an extension granted, plaintiff on June 16, 1919, filed its income and profits tax return for the fiscal year ended November 30, 1918, hereinafter referred to as 1918, showing a tax of $214,325.75, which was assessed and paid during 1919.

Pursuant to an extension granted, plaintiff on April 14, 1920, filed its return for the fiscal year ended November 30, 1919, hereinafter referred to as 1919, showing a tax of $552,-342.91, which plaintiff paid as follows: $140,000 on February 14, May 24, and August 13, 1920, and $132,342.91 on November 16, 1920.

February 16, 1921, plaintiff filed its return for the fiscal year ended November 30, 1920, hereinafter referred to as 1920, showing a tax of $409,891.30, which was assessed and paid during the calendar year 1921.

Each of the returns referred to above was a consolidated return and reported the income and profits tax liability of plaintiff and its subsidiary corporations.

2. February 14, 1922, plaintiff filed a claim for refund for 1919 and certain prior years on account of adjustments for depletion of natural deposits.

3. January 7, 1924, plaintiff executed and filed a waiver of the statutory period within which further taxes for 1918 might be assessed and collected, and that waiver was of unlimited duration.

January 25, 1924, plaintiff executed and filed a second waiver of the statutory period for assessment and collection of taxes for 1918, and that waiver provided for an extension of one year after the expiration of any previous extension.

December 3, 1924, plaintiff executed and filed a third waiver for 1918, which was identical in all respects with the second waiver.

November 14, 1925, plaintiff filed a fourth waiver for 1918, and a like waiver for each of the years 1919 and 1920. The material portions of the waiver for 1918 read as follows:

> In pursuance of the provisions of existing Internal Revenue Laws, Lehigh Portland Cement Company—parent, a taxpayer of Allentown, Pa., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1918 under existing revenue acts, or under prior revenue acts.
>
> This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

Each of the waivers referred to above was duly signed by the Commissioner.

4. The Commissioner audited and examined plaintiff's books of account and records and returns for 1918, 1919, and 1920, together with claim for refund referred to in finding 2, and on April 13, 1926, forwarded to plaintiff a deficiency notice by registered mail advising plaintiff of the results of his audit, as follows:

	Additional tax	Overassessment
November 30, 1918	$192, 117. 57	
November 30, 1919		$64, 423. 90
November 30, 1920	207, 537. 94	
Total	399, 655. 51	64, 423. 90

The deficiency notice read in part as follows:

> In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.
>
> Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.
>
> If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., * * *.

5. No appeal was taken by plaintiff to the United States Board of Tax Appeals from the Commissioner's determination of deficiencies for 1918 and 1920, as set forth in a 60-day

letter of April 13, 1926, and referred to in finding 4, nor did plaintiff file with the Commissioner a waiver of its right to appeal to the Board of Tax Appeals nor a waiver of the restrictions contained in section 274 (a) of the Revenue Act of 1926 on assessment and collection of those deficiencies.

6. May 22, 1926, the Commissioner assessed additional taxes and interest against plaintiff as follows:

	Taxes	Interest
Fiscal year ended November 30, 1918	$192,117.57	$2,742.28
Fiscal year ended November 30, 1920	207,537.94	
Total	399,655.51	2,742.28

The foregoing assessments were not jeopardy assessments. The Commissioner's assessment list containing the above assessments was received in the office of the collector of internal revenue at Philadelphia, Pa., May 25, 1926. It contained a notation as follows: "Collector: Withhold demand pending comparison with 11–30–19 overassessment."

7. May 28, 1926, the Commissioner signed a schedule of overassessments allowing an overassessment in favor of plaintiff for 1919 of $64,423.90. That schedule of overassessments, containing 57 separate items, was received by the collector June 1, 1926. June 30, 1926, the collector signed the schedule showing that the overassessment, having been found to be an overpayment, had been credited against the additional assessment of $192,117.57 for 1918, and on the same day the collector signed a schedule of refunds and credits setting forth thereon appropriate entries with respect to the crediting of the overpayment for 1919. The schedule of refunds and credits was returned to the Commissioner who signed it August 20, 1926.

8. July 7, 1926, the collector served notice and demand upon plaintiff for payment of the balance of the additional tax assessed for 1918 amounting to $127,693.67, together with interest thereon in the amount of $2,742.28, a total of $130,435.95, and on the same date the collector served notice and demand for payment of additional tax assessed for 1920 in the amount of $207,537.94. These amounts were paid in full July 17, 1926. Plaintiff took no action to enjoin the making of the assessment or the collection.

Reporter's Statement of the Case

A separate check was forwarded for each of the above payments, each containing the notation—"Paid under protest," and each being forwarded with a letter of transmittal which read as follows, except as to differences with respect to the amount and year involved:

> There is transmitted herewith check for $130,435.95 being in payment for additional tax against the undersigned taxpayer for the fiscal year ended November 30, 1918, in the sum of $192,117.57, plus interest of $2,742.28, less a credit for 1919 taxes overpaid of $64,423.90.
>
> You are hereby advised that this tax is paid under protest and that notation thereof has been made upon the check handed you in payment of this tax.

9. August 27, 1926, the Commissioner delivered to plaintiff a certificate of overassessment for 1919 showing the overpayment of $64,423.90 and that this amount had been credited against the deficiency heretofore referred to as having been assessed for 1918. That certificate showed that no interest had been allowed on the credit.

10. The making of the assessment, including the issuance of notice and demand, the scheduling of the overassessment and the crediting of the latter amount against the assessment for 1918, heretofore referred to, were handled in accordance with the off-set procedure in effect in the office of the Commissioner and more particularly described in the court's special findings of fact, finding 18, in *Eastman Kodak Co.* v. *United States*, 82 C. Cls. 504, 518, which finding is incorporated herein by reference.

11. April 28, 1930, counsel for plaintiff wrote a letter to the Commissioner requesting that the overpayment of $64,423.90 for 1919 be refunded on the ground that such amount was applied against additional tax for 1918, when collection of that additional tax was barred by the statute of limitations. In the same communication counsel for plaintiff called attention to the fact that no interest had been allowed on the credit and requested that interest be allowed in accordance with section 1116 of the Revenue Act of 1926.

May 26, 1930, plaintiff filed a claim for refund for 1919, on substantially the same ground as that set out in the foregoing letter. May 26, 1930, plaintiff filed claims for refund for 1918, and 1920, in the respective amounts of

$194,859.85 and $207,537.94, one ground set out in each claim reading as follows:

> The above tax was assessed and/or collected at a time when the Commissioner was without a legal right so to do; after the expiration of the statutory period of limitation properly applicable thereto; when such assessment and/or collection were barred by the Statute of Limitations. Such assessment and/or collection were therefore erroneous and illegal.

These claims are made a part hereof by reference.

In connection with the consideration of the above claims by the Commissioner, plaintiff's representatives urged as one ground for recovery that the assessments for 1918 and 1920 had been made prior to the expiration of the 60-day period following the mailing of the deficiency notice to plaintiff and that such action was in violation of the provisions of section 274 (a) of the Revenue Act of 1926.

December 12, 1930, the Commissioner rejected the claims for refund.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The tax and interest of $402,397.79 herein sought to be recovered for 1918 and 1920 were paid in cash and by credit well within the statutory period of limitation within which the tax could be assessed and collected. The credit of $64,423.90, overpayment for 1919, in part satisfaction of the deficiency for 1918 was entered by the collector on his books on June 30, 1926, and the balance of the deficiencies was paid on July 17, 1926. The statutory period of limitation with respect to assessment of the deficiencies for 1918 and 1920 was extended by waivers to December 31, 1926, and by the mailing of the deficiency notice to March 1, 1927, as no appeal was taken to the Board of Tax Appeals.

Plaintiff contends that since the deficiencies for 1918 and 1919 were assessed before the expiration of the period of sixty days following the mailing of the deficiency notice, and contrary to the provisions of section 274 (a) of the Revenue Act of 1926, such assessment was void, and

the credit of the 1919 overpayment and the payment of the balance of the deficiencies upon receipt of notice and demand from the collector were illegal collections, all of which, it insists, entitles it to recover the amounts with interest in this proceeding as erroneous and illegal collections. Plaintiff also contends that the waivers extending the statutory period of five years for assessment and collection of any deficiencies found to be due for the taxable years in question were conditional upon strict compliance by the Commissioner with all the provisions of section 274 (a) and any other provisions of the statutes with reference to assessment and collection of the tax and that, upon the date of the premature assessment, the waivers became, as of the date of their execution, without force and effect as extending the original statutory limitation period of five years with the result that the tax was barred by the applicable statute of limitation at the time it was assessed and collected.

The correctness of the amounts of the deficiencies and interest determined by the Commissioner and paid by plaintiff is not questioned. It is not disputed that plaintiff had a net income upon which the tax collected was imposed by the statute at the rates therein specified.

From the facts, about which there is no dispute, it appears that on April 13, 1926, the Commissioner mailed to plaintiff a notice under section 274 (a) of the Revenue Act of 1926 of his determination of deficiencies of $192,117.57 for 1918 and $207,537.94 for 1920. The Revenue Act of 1926 imposed interest upon deficiencies. Upon the mailing of such notice plaintiff was allowed by section 274 (a) sixty days thereafter, not counting Sunday as the sixtieth day, within which to file a petition with the United States Board of Tax Appeals for the redetermination of the deficiencies determined by the Commissioner. This section is as follows:

> (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such

Opinion of the Court

notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provision of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

(d) The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subdivision (a) of this section on the assessment and collection of the whole or any part of the deficiency. (44 Stat. 9, 55, 56.)

In making his determinations for 1918 and 1920 the Commissioner also considered, audited, and determined the tax liability for 1919 and determined an overassessment of $64,423.90 for that year, notice of which was also included in the above-mentioned notice mailed to plaintiff on April 13, 1926. No appeal was allowed to the Board with respect to the determination of the overassessment and no further proceedings were to be had in the Bureau of Internal Revenue with reference to such overassessment, except the scheduling and the allowance thereof by the Commissioner. By reason of the overassessment having been determined, and for the purpose of carrying out the customary procedure with reference to entering overassessments on a schedule of overassessments and credits as set forth in Finding 10, the Commissioner on May 22, 1926, before the expiration of the 60-day period allowed the plaintiff by section 274 (a), *supra*, within which it might appeal to the Board of Tax Appeals, assessed the additional taxes for 1918 and 1920, together with interest on the 1918 deficiency to the date of assessment. This was not a jeopardy assessment under Section 279. When sending this assess-

ment to the collector, the Commissioner instructed the latter to withhold demand pending comparison of the amounts assessed with the overassessment for 1919. Following the signing of the assessment list the Commissioner on May 28, 1926, signed a schedule of overassessments allowing the overassessment of $64,423.90 for 1919. This overassessment schedule contained fifty-seven separate items of overassessments with reference to various taxpayers, only one of which related to the tax liability of plaintiff. The schedule was received by the collector June 1, 1926, and on June 30, more than sixty days after the deficiency notice had been mailed to plaintiff by the Commissioner, the collector signed the overassessment schedule showing that the overassessment listed thereon was an overpayment and had, on that date, been applied against the additional tax of $192,117.57 determined and assessed for 1918. On the same day the collector signed a schedule of refunds and credits setting forth thereon appropriate entries made on his books with respect to the crediting of the overpayment for 1919 against 1918. This schedule of refunds and credits was returned to the Commissioner and was signed and approved by him on August 20, 1926.

No petition was filed by plaintiff with the United States Board of Tax Appeals with respect to the deficiencies determined for 1918 and 1919. But the making of the premature assessment did not interfere in any way with plaintiff's right to file a petition with the board and prosecute its case to a final decision. No demand was made upon plaintiff by the collector for the payment of the deficiencies within the 60-day period following the mailing of the deficiency notice, and the plaintiff did not, during such 60-day period, nor at any time thereafter, contest the assessment of May 22 as being invalid or void and no proceeding in court was instituted by plaintiff under section 274 (a) to enjoin the making of the assessment by the Commissioner or a collection thereon by the collector.

The collector on July 7, 1926, sometime after the expiration of the 60-day period within which the taxpayer might have filed a petition with the Board of Tax Appeals but which it did not do, mailed to plaintiff a notice and demand

for the payment of the balance of the additional tax assessed for 1918 amounting to $127,693.67, together with interest of $2,742.28, to the date of the assessment and also notice and demand for the additional tax of $207,537.94 for 1920. Upon receipt of this notice and demand, the plaintiff on August 17, 1926, paid the tax assessed without specific objection to the assessment as being premature or void. This was about eight months before the expiration of the statutory period of limitation as extended within which the Commissioner was authorized and allowed to assess the deficiencies. The checks issued by plaintiff in payment of the deficiencies each contained a notation "Paid under protest." These checks were transmitted to the collector with a letter from plaintiff advising the collector that the tax was being paid under protest (Finding 8), but no mention was made with reference to the assessment having been prematurely made nor was there indicated any intention specifically to protest the then validity or legality of the assessment or payment. Had any such question been raised or objection made to the regularity or validity of the assessment and collection, the Commissioner could have reassessed the tax at any time within about eight months thereafter.

On August 27, 1926, more than a month following the payment of the deficiencies for 1918 and 1920, the Commissioner delivered to plaintiff a certificate of overassessment showing that the overpayment of $64,423.90 for 1919 had been allowed and credited in part satisfaction of the deficiency assessed for 1918. No interest was paid upon this overpayment for the reason that the due date of the tax against which it was credited was prior to the date of overpayment. Plaintiff knew at the time it paid the deficiencies on July 17, 1926, that this credit had been made. Upon receipt of this certificate of overassessment, plaintiff made no protest or objection to the credit or to the assessment for 1918 against which it had been applied.

The only question which we are called upon to consider and decide in this case is whether an assessment of a tax which is premature under the provisions of section 274 (a), Revenue Act of 1926, is void and collection thereon an illegal

and void exaction. We do not consider or discuss when, or under what circumstances, an assessment and collection might otherwise be void and enjoined, notwithstanding the provisions of section 3224 of the Revised Statutes. Upon the facts presented by the record in this case, we are of opinion that the assessment and collection in question were not void and that plaintiff is not entitled to recover for the following reasons:

(1) Plaintiff took no action to enjoin the making of the assessment of May 22, 1926. After the tax had been prematurely assessed, no steps were taken by plaintiff to enjoin action thereon by the collector. Plaintiff was in no wise prejudiced by the assessment and collection.

(2) No action was taken by the collector to collect the deficiencies until after the expiration of the 60-day period following the mailing of the deficiency notice within which plaintiff might file a petition with the Board of Tax Appeals. No lien was placed upon any property of the plaintiff because of such assessment. No distraint proceeding was begun by the collector.

(3) An assessment which is premature under the provisions of section 274 (a), Revenue Act of 1926, is not void. If it had been intended that such an assessment should be considered void, there would have been no occasion for Congress to enact the provision making an exception to section 3224 of the Revised Statutes so that a taxpayer might enjoin the making of a premature assessment or might enjoin its enforcement until the procedure outlined in the statute had been completed.

(4) In substance the provisions of section 274 (a) of the Revenue Act of 1926 to the effect that no assessment and collection of the deficiency shall be made until a taxpayer has been given an opportunity to appeal to the Board and, if an appeal is taken, until the decision of the Board becomes final were not new. Similar provisions with reference to assessment and collection, after appeal, hearing, and final decision, were enacted in the Revenue Act of 1921 and subsequent acts. The injunctive remedy authorized by section 274 (a) was given to a taxpayer as a means of preventing (during the periods mentioned in section 274 (a)) that

which had often occurred in the past under circumstances in which a taxpayer could not prevent the making of assessment or collection before final adjudication of its tax liability—namely, harassment through the levying of a lien upon the taxpayer's property, demands for payment, or distraint and sale of property to satisfy the assessment, or the giving of a bond.

(5) The provisions of section 274 and other provisions of the Revenue Act of 1926 with reference to assessment and collection evidence a clear purpose to limit the taxpayer, if he desires to object to a premature assessment or collection, to the specific remedy provided in section 274 (a) if timely invoked, and are inconsistent with the theory that timely action by injunction may be waived and suit thereafter brought to recover the tax solely on the ground that it was prematurely assessed, paid, or collected.

(6) The remedy by injunction provided by section 274 (a) of the Revenue Act of 1926, as an exception to the provisions of section 3224 of the Revised Statutes, becomes barred upon the expiration of sixty days after the mailing of the deficiency notice if no petition is filed with the Board and, if a petition is filed with the Board, a proceeding to enjoin collection of a deficiency becomes barred on the date the decision of the Board becomes final in a case in which either party may appeal to the Circuit Courts of Appeals. The injunctive remedy provided by section 274, being an exception to the general provisions of law contained in section 3224, R. S., against enjoining the assessment and collection of a tax, is, under the plain language which grants the remedy, only available to the taxpayer during the period of time specified in the statute for the carrying out of the procedure therein provided.

(7) When, as in the case at bar, an assessment prematurely made is not questioned in the manner specified in section 274 (a) and payment is otherwise timely and legally demanded at a time when the Commissioner and the collector are free to act, such assessment and collection cannot be enjoined under the positive provisions of section 3224, R. S. Nor can a taxpayer, who has not appealed to the Board, recover the tax so paid or collected unless he sub-

sequently files a proper claim for refund and shows that the tax has in fact been overpaid. In such case, or a case where the taxpayer has appealed to the Board and the decision of the Board has become final, or the time has arrived when the Commissioner might make a timely and unobjectionable assessment and collection (sec. 1005 (c)), a premature assessment becomes valid for the purpose of collection and its enforcement may not thereafter be enjoined. Even though assessment and collection may be premature, a taxpayer who has or has not appealed to the Board before the expiration of the 60-day period, or when the decision of the Board becomes final, may not thereafter recover the tax by suit on that ground alone. In the first case an overpayment in fact must be shown and, in the second, the decision of the Board is final and no suit is authorized. The taxpayer's sole remedy in such case is either to enjoin the making of the assessment or to enjoin collection thereon until collection may be made under the statute.

Provisions directing that, except in case of jeopardy, the assessment and collection of a deficiency should not be made until the taxpayer had first been notified of such deficiency by registered mail and given an opportunity to appeal, and to have a hearing and a decision made thereon, were first enacted in section 250 (d), Revenue Act of 1921, and the purpose of those provisions was explained in House Report No. 350, Revenue Act of 1921, p. 14, and Senate Report No. 275, pp. 20, 21, 67th Cong., 1st sess.

In the Revenue Act of 1924 substantially the same provisions were reenacted and continued in section 274 (a), (b), (c) and (d), with a defined procedure more favorable to the taxpayer in that he was given a right to appeal within sixty days to the Board of Tax Appeals created by section 900, Title IX, of that act, instead of to an agency in the Bureau of Internal Revenue, and to have a public hearing and decision in his case. The time when assessment and collection should be made was postponed until the time for appeal had expired or until the Board had entered its decision. Subdivision (a) of section 274 provided that, except

in case of a jeopardy assessment, the Commissioner should notify the taxpayer by registered mail of a deficiency determined by him, as had previously been the rule, and the taxpayer, instead of having thirty days within which to protest and appeal to an agency designated by the Commissioner, which had previously been the Committee on Appeals and Review in the Bureau of Internal Revenue, should have sixty days after the mailing of such notice within which to appeal to the Board of Tax Appeals created and established as an independent agency in the Executive Branch of the Government as an impartial tribunal to adjudicate questions concerning taxes between the taxpayer and the Government. Subdivision (b) provided that when the Board had rendered its decision the amount so determined by the Board should be assessed and paid upon notice and demand from the collector but that no amount determined as a deficiency by the Commissioner, but disallowed by the Board, could be assessed, but that the Commissioner might institute a proceeding in court, without assessment, for the collection of any amount of a deficiency determined by him, but disallowed by the Board, if he desired to do so, provided such suit was begun within one year after the final decision of the Board. Under these subdivisions the Commissioner was not authorized to make an assessment or to collect the deficiency, except in the case of jeopardy, until the expiration of sixty days allowed for appeal to the Board, or, if an appeal was filed with the Board, until the Board's decision had been entered. But no right to enjoin the making of a premature assessment or collection thereon was given.

Under the 1924 Act there was no right of a direct appeal from a decision of the Board to a Circuit Court of Appeals, but under other provisions of the 1924 Act the taxpayer, if dissatisfied with the decision of the Board, was authorized to file a claim for refund and, upon its disallowance by the Commissioner, to bring suit in court to recover, in whole or in part, the deficiency determined by the Board. Subdivision (c) of section 274 of the 1924 Act provided, as did section 274 of the 1926 Act, that if a taxpayer, in respect of whose tax a deficiency had been

determined by the Commissioner, did not file an appeal with the Board within sixty days after the mailing of a deficiency notice, the deficiency determined by the Commissioner should then be assessed and should be paid upon notice and demand from the collector. Section 277 of the 1924 Act suspended the running of the statute of limitation as to assessment because of the provision giving the taxpayer a right to appeal to the Board and to have a decision in his case before being required to pay the tax and because of the provision that the tax should not be assessed and collected until the Board had entered its decision in the case. The first suspended period was 60 days and the second for the number of days between the date of mailing of such notice and the date of the final decision by the Board. Subdivision (d) of section 278 of the 1924 Act provided, as did a similar provision in the 1926 Act, that a tax assessed within the period prescribed in section 277, or within such period as extended by a waiver, might be collected within six years after such assessment provided such assessment or collection was not barred on June 2, 1924.

The reasons for the provisions with reference to withholding assessment and collection of a deficiency until after the taxpayer had had an opportunity to appeal to the Board of Tax Appeals and, if an appeal was filed, until he had been heard and until the decision of the Board had been entered were explained by the Committee on Ways and Means in House Report 179 on the Revenue Bill of 1924, 68th Cong., 1st sess., pp. 7 and 8, relating to the Board of Tax Appeals, and pp. 24, 25, and 26 relating to sections 274 and 277 concerning assessment and collection. See, also, Report No. 398 of the Senate Finance Committee, 68th Cong., 1st sess., pp. 30–32, 42.

Although the Revenue Acts of 1921 and 1924 provided that, except in case of jeopardy, assessment and collection of a deficiency should not be made until the taxpayer had been given an opportunity to be heard and to have a final decision made in the case, it is shown by the early decisions of the Board of Tax Appeals that the Commissioner sometimes did make premature assessments but that in the case of

such assessments, where the final determination by the Commissioner with respect to the tax was subsequently made as to taxes imposed by an act prior to the Revenue Act of 1924, the taxpayer might appeal to the Board from such final decision. *Ormsby McKnight Mitchell*, 1 B. T. A. 143; *California Associated Raisin Company*, 1 B. T. A. 314; *Terminal Wine Company*, 1 B. T. A. 698. In *Northwestern Mutual Life Insurance Company*, 1 B. T. A. 767, the Board held that an appeal properly filed and pending lapsed when the taxpayer paid the tax determined by the Commissioner as a deficiency. In that case the Board held that after the right of appeal had vested under section 274 of the 1924 Act the Commissioner could not oust the Board of jurisdiction by the act of assessment; that one of the parties might not take a step which, adversely to the other party and without his consent, would deprive him of his opportunity to be heard. But it was further held that when the taxpayer did not stand upon his right to have an adjudication before payment but chose to pay the tax, there was nothing left for the Board to decide inasmuch as it did not have jurisdiction under the 1924 Act to determine overpayments. The Board also pointed out that the Commissioner did not seek to deprive the taxpayer of his right to appeal nor was the taxpayer, in that case, forced involuntarily to make payment. See also *Camden & Burlington County Railway Co.*, 3 B. T. A. 602, and *Dickerman & Englis, Inc.*, 4 B. T. A. 447. It was for this reason that the provisons of subdivision (d) of section 274 of the Revenue Act of 1926 were enacted. In that subdivision it was provided that the taxpayer should, at any time, have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subdivison (a) on the assessment and collection of the whole or any part of the deficiency. In addition this right was extended to the taxpayer in order that he might pay the tax at any time and save interest on the deficiency without losing his right to appeal to the Board of Tax Appeals. See Senate Report No. 56 on the Revenue Bill of 1926, 69th Cong., 1st sess., p. 27.

With this background the purpose and intent of the enlarged provisions of section 274 and other sections of the

Revenue Act of 1926, hereinafter mentioned and under which this case arose, can be better understood.

Title X, sec. 1000 of the Revenue Act of 1926 continued the Board of Tax Appeals and enlarged its authority and jurisdiction for the reasons as set forth in Report No. 1 of the Ways and Means Committee on the Revenue Bill of 1926, 69th Cong., 1st sess., pp. 17–21, and Report No. 52 of the Senate Committee on Finance, 69th Cong., 1st sess., pp. 25–28 and 31–38. Section 274 (a) of the 1926 Act reenacted the provisions of the 1924 Act with reference to the mailing by the Commissioner of a notice of his determination of a deficiency and with reference to the right of the taxpayer to file a petition with the Board of Tax Appeals. The provisions contained in prior revenue acts with reference to the right of a taxpayer to notice and an opportunity to appeal and have a final decision in his case, and as to the payment of the tax, were expressed in more positive terms in subdivision (a) of section 274 of the Revenue Act of 1926, but there is nothing in the provisions of that or other sections to justify the conclusion that Congress intended that a premature assessment should be absolutely void. A study of such provisions convinces us that it was not so intended. The language of subdivision (a) is, with certain exceptions not material here, that "no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted, until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final." Then follows the provision that "Notwithstanding the provisions of section 3224 of the Revised Statutes the *making of such assessment* or the *beginning* of such proceeding or *distraint during the time* such prohibition is in force *may be enjoined* by a proceeding in the proper court." (Italics supplied.) If it had been intended that an assessment, payment, or collection made before the expiration of the period specified should be void and of no effect, there would have been no necessity for the provision giving the taxpayer a right to enjoin the making of an assessment,

or, if made, to enjoin collection during the period mentioned. It would have been an easy matter for Congress, had it intended that a premature assessment should be void, to simply so state and we think it is clear that if Congress had so intended it would have used language sufficiently clear not to be misunderstood.

It will be seen from what has hereinbefore been stated that the provision of section 274 just quoted with reference to when assessment and collection should be made was, in substance, the same as the provision contained in the Revenue Acts of 1921 and 1924. In view of the experience under similar provisions in prior acts and in order that a taxpayer might have some means of protecting himself against premature assessments, the levying of liens upon his property, premature demands for payment, distraint and sale of property, or proceedings in court, the Congress authorized suit for an injunction until the time for collection had arrived. See House Report No. 1, p. 10, and Senate Report No. 52, p. 26, *supra*, 69th Cong., 1st sess. The language of the sentence relating to an injunction makes it clear, we think, that this remedy was to be available to the taxpayer only "during the time" during which the statute directed that the tax should not be assessed or collected. This provision giving the taxpayer a remedy by which he could protect his right to an adjudication of his tax liability by the Board prior to payment was inserted in the 1926 Act by the Senate Finance Committee and that committee stated, at p. 26 of its report No. 52, *supra*, that "The bill, therefore, contains in section 274 (a) a provision that despite section 3224 of the Revised Statutes (which prohibits injunctions to restrain the assessment or collection of the tax) the taxpayer may in a proper case go into court for an injunction to restrain the commissioner *from assessing* or *collecting* a deficiency *until the procedure outlined in the bill has been completed*. It is the purpose of the bill that all questions arising prior to the time the decision of the board has been rendered as to the right of the commissioner to assess and collect the tax, * * * shall be determined by the board and by the courts on appeal from the board." [Italics supplied.]

Subdivision (b) of section 274 of the 1926 Act provided that if the taxpayer filed a petition with the board, the deficiency redetermined by the board in a decision which had become final should be assessed and paid upon notice and demand from the collector, but that no part of a deficiency disallowed by the board might be collected by assessment, distraint, or a proceeding in court. Subdivision (c) provided that if a taxpayer did not file a petition with the board within sixty days after the mailing of the deficiency notice, the deficiency determined by the Commissioner should be assessed and paid upon notice and demand from the collector. In subdivision (d) of section 284 of the 1926 Act the board was given jurisdiction to determine whether or not the taxpayer had overpaid its tax in respect of any year before the board for which the Commissioner had determined a deficiency. For the first time the Revenue Act of 1926 imposed interest upon a deficiency in tax from the date of enactment of the act on February 26, 1926, to the date of assessment of the deficiency. By reason of this fact and the fact as hereinbefore stated, that the Board of Tax Appeals had held that a payment of a deficiency in whole or in part deprived it of jurisdiction to the extent of such payment, it was provided in subdivision (d) of section 274 that the taxpayer should have the right at any time to waive restrictions upon assessment and collection. (See House Report No. 1, p. 27.) In view of these reasons section (d) cannot be construed as indicating an intention to make a premature assessment or collection absolutely void in the absence of written consent by the taxpayer.

Section 1005 of the 1926 Act specified that the decision of the board should become final on one of several dates depending upon whether the taxpayer or the Commissioner filed an appeal from the decision of the board and the action of the appellate courts thereon. Section 284 (d) of the 1926 Act specifically provided that when a taxpayer to whom a deficiency notice had been mailed under section 274, and who had appealed to the board, might, under certain circumstances, institute suit with respect to such deficiency. This section, however, expressly prohibits the

making of any credit or refund in respect of the tax determined by the board to be due for the year for which the Commissioner determined the deficiency and states that no suit by the taxpayer for the recovery of any part of such tax may be instituted in any court, except in the cases specified, none of which are applicable here. In none of the cases mentioned in the statute in which a suit may be brought where an appeal has been taken to the board is the taxpayer, either expressly or impliedly, given a right to recover a tax determined by the board on the ground that such deficiency was prematurely assessed or paid even though the taxpayer had not waived in writing the restrictions provided in section 274 (a) upon assessment and collection. The provisions of subdivision (d) of section 274 added nothing to the provisions of subdivision (a) of that section. It had a distinct purpose which was fully explained by the Congressional Committees.

So far as concerns a premature assessment or an attempted collection before the date on which the Commissioner and the collector are free to assess and collect under the provisions of sections 274 and 1001 (c), the injunctive remedy given to the taxpayer by section 274 (a) is exclusive, and the period of limitation within which a taxpayer may question such assessment by a proceeding to enjoin a premature assessment or attempted collection expires on the arrival of the date when, under the provisions mentioned, assessment or collection can be made or enforced. The right to enjoin the making of a premature assessment or collection by distraint or otherwise exists only for the period during which sections 274 (a) and 1005 (c) specify that no assessment or collection should be made. Since the right to obtain an injunction was given to the taxpayer in order that he might protect himself against being compelled to pay deficiencies before the procedure outlined in the statute had been completed, there would seem to be no basis for the conclusion that when that remedy is not timely invoked a premature assessment, payment, or collection of a deficiency of which the taxpayer has been duly notified should be held to be void. For the same reasons a timely collection, although on a premature assessment, is not void. Since the right to insti-

tute a proceeding to enjoin a premature assessment or collection was a privilege extended to the taxpayer, it may be lost by failure seasonably to assert it. It is well settled that a statutory provision may be waived by one for whose benefit it was enacted or intended and such a waiver may as effectively be accomplished negatively by failure timely to invoke the remedy given or positively by an express consent. In legal contemplation the one is as effective as the other. The court must attach to the conduct of the taxpayer consequences consistent with the obvious policy underlying section 274 (a). If the taxpayer does not pursue the remedy given him to prevent collection until the procedure outlined in the statute with reference to appeal to the Board of Tax Appeals is completed, he cannot afterwards complain.

In the case at bar the assessment of the deficiencies for 1918 and 1919 was premature since the assessment list sent to the collector by the Commissioner was signed before the expiration of the period of sixty days following the mailing of the deficiency notice, but their payment was timely and legal inasmuch as plaintiff did not file a petition with the Board of Tax Appeals and payment was not made until after the expiration of such sixty-day period. The collector made no demand for payment of the tax and took no steps to require the taxpayer to pay any portion thereof until after the expiration of the sixty days from the mailing of the deficiency notice. The credit entries applying the 1919 overpayment against the 1918 deficiency were not made until after the expiration of such 60-day period. We have held that a timely collection is not illegal because the assessment may have been irregular or not strictly in conformity with the statute. *John Muir* v. *United States*, 78 C. Cls. 150; *Mahoning Investment Co.* v. *United States*, 78 C. Cls. 231; *Pioneer Coal & Coke Co.* v. *United States*, 83 C. Cls. 200, 217 218; *Anderson, et al.* v. *United States*, 83 C. Cls. 561, 578; *Combined Industries Inc.* v. *United States*, 83 C. Cls. 613; *Blue Jay Lumber Co.* v. *United States*, 89 C. Cls. 66. See, also, *Van Antwerp* v. *United States*, 92 Fed. (2d) 871.

Since the revenue laws, R. S., sec. 3182, Act of 1864 (U. S. C. secs. 1530, 1531, Tit. 26), give the Commissioner jurisdiction and authority to assess all taxes, an error or

irregularity as to the procedure or time of making an assessment will not render it void any more than an error or irregularity in the proceeding of a court having jurisdiction will render its judgment void. See *Delaware Railroad Co.* v. *Prettyman*, Fed. Cas. #3767; *Kensett* v. *Stivers*, 10 Fed. 517. A premature assessment or collection of a tax cannot be regarded as having the same effect or as giving a taxpayer the same right to recover it as an assessment or collection after the expiration of the statutory period of limitation allowed for assessment and collection. And provisions to the effect that the Commissioner shall not assess or collect a deficiency during a certain period, or periods, of time within the statutory period of limitation for assessment or collection, and which give the taxpayer a specific and adequate remedy if a premature assessment, or attempted collection, is made, cannot be construed as repealing the Commissioner's jurisdiction to assess or as rendering void the Commissioner's act of assessing or collecting. Section 1009, Title X, Revenue Act of 1924, and section 1109 (a) (1), (2), and (3) Title XI, Revenue Act of 1926, now in force, in fixing the limitation periods specified in those sections and in sections 277, 278, 310, and 311 beyond which a tax might not be assessed or collected by distraint or suit, expressly terminated and took away the jurisdiction and authority under section 3182, R. S., of the Commissioner and the collector to assess and collect.

Plaintiff in support of its contention that the premature assessment was void and that collection thereafter pursuant to such assessment was likewise illegal and void relies upon the decisions in *Ventura Consolidated Oil Fields* v. *Rogan*, 86 Fed. (2d) 149, 151–160; *United States* v. *Yellow Cab Co.*, 90 Fed. (2d) 699–701, and *United States* v. *Barber et al.*, 24 Fed. Supp. 229.

In the first-mentioned case it appears that the Commissioner determined deficiencies for 1920 to 1923, inclusive, and on September 4, 1929, mailed to the taxpayer by registered mail a notice of his determination of the deficiencies in accordance with adjustments to which the taxpayer had agreed in conference, and, in the deficiency notice it was stated that, inasmuch as it was believed that the computa-

tion of the tax liability for the years mentioned would be satisfactory and that the taxpayer would desire definitely to close the case as promptly as possible, the taxpayer was requested to execute Form 866 entitled "Agreement as to Final Determination of Tax Liability," which form was used for the purpose of finally closing a case under the provisions of section 606 of the Revenue Act of 1928. The taxpayer was satisfied with the correctness of the deficiencies so determined by the Commissioner in this notice and on October 11, 1929, signed and filed with the Commissioner's office the agreement, Form 866. This closing agreement was not executed by the Commissioner or by the Secretary of the Treasury for the apparent reason, in view of what the Commissioner subsequently did, that the Commissioner came to the conclusion that an error had been made in the determination of the deficiencies for certain of the years with respect of which the taxpayer had been notified by registered mail on September 4. The period of sixty days following the mailing of the notice of September 4, 1929, expired on November 4. On November 2, 1929, two days before the expiration of such period, the Commissioner assessed the deficiencies so determined for the years 1920–1923, inclusive. It does not appear from the reported facts whether or not at the time of assessment the Commissioner had discovered the error in the first determination as to 1920 and 1921. The reported facts do not disclose what action, if any, the collector took on the assessment of November 2, 1929, prior to institution by the taxpayer, apparently in 1932, of a proceeding in the District Court to enjoin the collection of the deficiencies so assessed. The taxpayer did not file a petition with the Board of Tax Appeals for a redetermination of the deficiencies for 1920 to 1923, inclusive, as determined by the Commissioner and set forth in the registered notice mailed by him on September 4, 1929.

Thereafter, on March 29, 1930, the Commissioner after further consideration of the tax liability of *Ventura Consolidated Oil Fields* for 1920 and 1921, in connection with his consideration of plaintiff's liability for 1919, determined that an error had been made in his prior determination of

September 4, 1929, with respect to deficiencies due for the years 1920 and 1921. Thereupon he made an additional determination of the correct deficiencies for 1920 and 1921 which were $214,687.48 and $100,223.75, respectively, in excess of the deficiencies previously determined and of which the taxpayer had been notified. On that date, March 29, 1930, the Commissioner notified the taxpayer of his final determination of its correct tax liability for 1919, 1920, and 1921 and of the deficiencies first determined and assessed and also, of the additional deficiencies for 1920 and 1921 above mentioned The Commissioner was authorized to make and mail notice of this second determination since the taxpayer had taken no appeal from the first determination. See section 274 (f) of the Revenue Act of 1926. Upon receipt of this deficiency notice of March 29, 1930, the taxpayer filed a petition with the Board of Tax Appeals contesting the correctness of the Commissioner's determination for 1920 and 1921. Upon this appeal the jurisdiction and authority of the board and the appellate courts extended not only to the amount of the additional deficiencies last determined by the Commissioner, but to the entire tax liability including the original tax paid upon the returns and the deficiencies for 1920 and 1921 first determined by the Commissioner in the notice of September 4, 1929, and assessed on November 2, 1929. Thereafter, on July 13, 1931, the taxpayer agreed to the correctness of the tax liability determined by the Commissioner for 1920 and 1921, which amount included the deficiencies determined September 4 and assessed November 2 and, also, to the correctness of the additional deficiencies determined by the Commissioner in his second determination of March 29, 1930. A stipulation by the parties to that effect was filed with the Board of Tax Appeals and the Board accordingly entered its decision approving the deficiencies as determined by the Commissioner. In this stipulation the taxpayer stated that it contended that the assessment of November 2 was illegal and that by stipulating the correctness of the tax liability which included the deficiency so assessed and the correctness of the deficiencies determined on March 29, 1930, it did not admit that the assessment of November 2, 1929, was valid.

The second, or additional, deficiencies of $214,687.48 and $100,223.75 determined by the Commissioner for 1920 and 1921 on March 29, 1930, were assessed and paid subsequent to the decision of the Board of Tax Appeals and were not involved in the proceeding for an injunction subsequently instituted by the taxpayer.

Although the reported facts do not definitely show, it would appear that the collector took no action to collect the deficiencies for the years 1920 to 1923, inclusive, first determined by the Commissioner until the additional deficiencies determined on March 29, 1930, were finally determined by the Board and assessed, and when demand was made by the collector for payment of the deficiencies determined on September 4, and assessed on November 2, 1929, the taxpayer instituted a proceeding in the District Court praying an injunction under section 274 (a), Revenue Act of 1926, restraining the collector from collecting, or attempting to collect, the deficiencies so assessed on the ground that the assessment having been prematurely made was void; that the notice which the Commissioner mailed to the taxpayer on September 4, 1929, disclosing his determination of these deficiencies was not a proper deficiency notice under section 274 (a), and that the registered notice of March 29, 1930, was not a deficiency notice as to the first deficiencies for 1920 and 1921. The injunction proceeding instituted by the taxpayer was begun after the expiration of the statutory period of limitation as extended by waivers within which the Commissioner might assess the tax. But under section 278 (d) and section 1109 (a) (3), Revenue Act of 1926, giving six years after assessment to collect the government insisted legal collection could be made.

The District Court dismissed the suit—6 Fed. Supp. 327, 331. The Circuit Court of Appeals, by a divided court, held, first, that the registered notice of September 4, 1929, was not a proper deficiency notice under the provisions of section 274 (a); second, that if it was a notice of the deficiencies from which the taxpayer might have appeal to the Board of Tax Appeals within sixty days, or if the letter of March 29, 1930, from which an appeal was taken, was a notice of the deficiencies first determined for 1920 and 1921,

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collection of the deficiencies first determined should be permanently enjoined for the reason that such deficiencies had been assessed before the expiration of sixty days following the mailing of the first notice and before the mailing of the second notice; that such assessment was therefore void and of no effect and that no legal collection could be made thereon at any time.

In the case of the *United States* v. *Yellow Cab Co.*, *supra*, it appears from the original record before the Circuit Court of Appeals that the Commissioner made a final determination in respect of the tax liability of the Yellow Cab Company for 1924, 1925 and 1926, and on December 30, 1929, one day before the expiration of the statute of limitation as extended by waiver, mailed to the taxpayer a registered deficiency notice from which the taxpayer was entitled to appeal to the Board of Tax Appeals. A waiver of the statute of limitation which the taxpayer had filed provided that if a deficiency notice was mailed before December 31, 1929, the limitation period for assessment and collection should then be further extended as provided by statute. The taxpayer filed a petition with the Board of Tax Appeals on February 27, 1930. Paragraph 3 of the petition filed with the board stated that the taxes in controversy were for the calendar years 1924, 1925, and 1926, for which the Commissioner had determined deficiencies, but the only errors alleged in the petition to have been committed by the Commissioner in his determination were stated specifically as concerning only the years 1925 and 1926; and no error was alleged in the petition before the Board and no statement of fact was made therein asserting in any way that the deficiency determined by the Commissioner for 1924 was contested or was, in any wise, incorrect. On March 15, 1930, while this petition was pending before the board, the deficiency for 1924, which the Commissioner had determined, was assessed with accrued interest to the date of assessment. On March 29, 1930, the collector mailed to the taxpayer notice and demand for the deficiency, and interest, for 1924. Immediately upon receipt of this notice and demand the taxpayer advised the collector that the deficiency for 1924 was not properly payable since the proceeding before the Board of Tax Appeals covering the

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deficiency for 1924 was still pending and that no final order or decision with respect thereto had been made by the board. Thereupon the collector took no further steps to collect the deficiency until October 7, 1930. In the meantime, on April 14, 1930, the Commissioner filed with the Board of Tax Appeals a motion to dismiss the petition, insofar as it related to the year 1924, for the reason that it contained no assignment of error nor any allegation of fact with respect to the year 1924. This motion of the Commissioner came on for hearing before the board on June 18, 1930, and no objection was made to the motion and no appearance was made on behalf of the taxpayer. On the following day the board entered its decision granting the motion to dismiss as to 1924 on the grounds stated therein and finding a deficiency for that year in the exact amount determined by the Commissioner. Thereafter, on October 7, 1930, the collector sent to the taxpayer a notice and demand for the payment of the deficiency for 1924 which had theretofore been assessed on March 15, 1930. No response or communication was received by the collector from this notice and demand and on October 27, 1930, he sent to the taxpayer another notice and demand for payment of the 1924 deficiency and interest to the date of assessment. On the same date, to-wit, October 27, 1930, the taxpayer paid the deficiency for 1924, together with interest, under written protest stating that the tax and interest were being paid to avoid penalties and distraint on property and declaring, in the same protest, that "the assessment of said tax and demand for payment and enforcement thereof are unlawful."

The taxpayer in the *Yellow Cab case* did not at any time apply to any court for an injunction to restrain the collector from collecting, or attempting to collect, the deficiency for 1924 prior to a date six months after entry of the decision of the Board dismissing the petition as to such year. Thereafter, on February 26, 1934, more than three years after payment the Yellow Cab Company, after filing a claim for refund, brought suit in the District Court for the Northern District of Illinois to recover the deficiency and interest paid for 1924 on the sole ground that the assessment of March 15, 1930, was void and that collection on the basis thereof was likewise illegal and void. The

District Court and the Circuit Court of Appeals for the Seventh Circuit held, first, that notwithstanding the provisions of Section 284 (d) (1), (2), and (3), Revenue Act of 1926, and the fact that the taxpayer had appealed to the Board of Tax Appeals, the District Court had jurisdiction to entertain the suit and enter judgment for recovery of the tax; and, second, that the premature assessment was void and collection thereunder was illegal and, therefore, recoverable, notwithstanding the taxpayer took no steps to enjoin the making of the assessment or to enjoin the collection of the tax prior to a date six months after the entry by the board of its decision dismissing the taxpayer's petition and determining the deficiency sought to be recovered.

The case of *United States* v. *Barber et al.*, 24 F. Supp. 229, was a suit in equity by the United States against Barber and others to impress a trust on the property of the defendant alleged to have been fraudulently received by them from a corporation against which the Commissioner had determined an income-tax deficiency for 1929. From the facts in this case it appears that the Commissioner determined a deficiency in respect of the tax of the Finance and Audit Corporation for 1929 and, on March 7, 1932, mailed to that taxpayer a registered notice of the deficiency in accordance with section 274 (a) of the Revenue Act of 1926. The taxpayer was allowed by statute sixty days, not counting Sunday as the sixtieth day, in which to file a petition with the Board of Tax Appeals. The sixtieth day of the period did not fall on a Sunday and the taxpayer did not file a petition with the board within the 60-day period specified in section 274 (a) but filed its petition on the sixty-first day. On May 21, 1932, the Commissioner assessed the deficiency and interest thereon to date of the assessment because the taxpayer had not filed its petition with the board within sixty days. In due course, on July 22, 1932, the Board of Tax Appeals dismissed the petition for lack of jurisdiction because it had not been filed within the 60-day period as provided by the statute. On some date not disclosed by the reported facts, but apparantly after the board had dismissed the petition for lack of jurisdiction, the

collector sent to the corporation taxpayer notice and demand for payment of the deficiency, to which no response of any kind was made. Subsequently the collector issued a warrant of distraint against the corporation but no collection was made thereon for the reason that no property of the corporation could be found to satisfy the distraint warrant. The taxpayer corporation was dissolved April 1, 1933, and passed out of existence under the laws of the State of Delaware on March 31, 1936. Thereafter the suit by the Government was instituted in the District Court for Maryland. The defendants moved to dismiss the suit on the ground that assessment of the tax by the Commissioner on May 21, 1932, while a petition by the taxpayer was pending before the Board of Tax Appeals, was void. Other grounds in support of the motion to dismiss were alleged but they were either overruled by the court or held not to be important in the decision reached.

Upon the facts above stated the court held that the assessment of May 21, 1932, was void and could not be made the basis of a suit against the defendants who were alleged to have fraudulently received the property of the corporation against which the assessment had been made. In none of the three cases above-mentioned was the assessment involved a jeopardy assessment.

Plaintiff also relies upon the decision in the case of *American Equitable Assurance Co.* v. *Helvering*, 68 Fed. (2d) 46, but the decision in that case is not in point for the reason that the court held that the assessment involved was justified as a jeopardy assessment.

For the reasons hereinbefore stated, we are of opinion that an assessment regularly made and correct in amount is not absolutely void merely because it is premature; that where a taxpayer, in respect of whose tax liability a premature assessment of a deficiency is made, does not proceed under the authority of the provisions of section 274 (a) of the Revenue Act of 1926 to enjoin collection by notice and demand, distraint, or otherwise, until the expiration of the 60-day period or until a date six months after the entry of a deficiency judgment by the Board of Tax Appeals, it cannot subsequently enjoin collection or recover the defi-

ciency so assessed which has not been in fact overpaid. The provisions of section 3224, Revised Statutes, then become applicable. We are therefore unable to concur in the conclusion of the courts in the cases mentioned that a premature assessment is void; that no collection can at any time, or in any manner, be legally made thereon; and that the taxpayer may enjoin collection at any time or waive his right to enjoin collection during the period prior to the expiration of the 60-day period, or the expiration of the period between date of the mailing of the deficiency notice and a date six months after the entry by the board of its decision, and thereafter maintain a suit to recover the tax. We think the statute does not give a taxpayer an election of remedies. Congress gave the taxpayer a specific remedy, but that remedy cannot be extended beyond the period for which it was provided, nor, if it is not invoked, can it be later converted into a suit to recover the tax. Compare *Rock Island, Arkansas, & Louisiana Railroad Co.* v. *United States*, 254 U. S. 141, 143.

Courts of equity have always refused their aid where the party seeking it has slept on his rights, or by long silence has indicated acquiescence. Nothing can call forth a court of equity into activity but conscience, good faith, and *reasonable diligence.*

The provision in section 274 (a) which carved out of section 3224, Revised Statutes (enacted March 2, 1867), an exception in favor of a taxpayer for injunctive relief under certain circumstances and during a certain period of time was purely a matter of policy. It was inserted from notions of expediency and must be tested by the same considerations; when so tested, it is clear that such provision was only one of many statutory provisions, all of which were for the main purpose of protecting the revenues and, at the same time, providing an orderly procedure for adjudication in the manner authorized before payment should be required. Harmless procedural errors or deviations from the general plan which work no hardship upon the taxpayer, or to which he does not object in the manner specified in the statute, nor which in any way deprive him of any of the substantive rights, privileges, or protection afforded and

intended to be secured by the plan outlined, cannot be made the basis for avoiding the payment of a just tax because the taxpayer did not at any time avail himself of the specific remedy given which, if invoked, would go not to the validity of the tax nor the right to collect it, but only to the time when it may be collected.

We find no merit in the second contention that the waivers of the statute of limitation filed by plaintiff were rendered ineffectual by the premature assessment. The tax here sought to be recovered was paid after the expiration of the 60-day period following the mailing of the deficiency notice (no petition having been filed with the Board), and notice and demand for payment of the deficiencies was not given until after the expiration of such period. The original statutory period of limitation expired before the deficiency notice was mailed and before the premature assessment was made. The waivers filed extended such original statutory period to December 31, 1926, and for a further period of sixty days if a deficiency notice should be mailed prior to December 31, 1926, and also for a further period to a date on which the decision of the board should become final if a petition should be filed with the board. The revenue statutes have for many years provided for the filing of waivers of the statute of limitation. Although waivers filed subsequent to the enactment of the Revenue Act of 1924 have contained provisions with reference to the last two periods above mentioned, such provisions add nothing to the provisions of sections 277 and 278 of the Revenue Acts of 1924 and 1926. Inasmuch as the deficiency notice in the case at bar was mailed prior to December 31, 1926, during the first period covered by waivers, the Commissioner had the benefit under the provisions of sections 277 and 278 of the second periods even if the waiver had made no reference thereto because the limitation period, as extended by the waivers to December 31, 1926, still remained the statutory period of limitation and the deficiency notice was mailed and the tax was paid within that period. A statute must be construed with reference to its objects and the statutory provisions with reference to determination, appeal, assessment, and collection must be read into a waiver extending the limitation period.

The situation, so far as the waivers filed by plaintiff are concerned, is therefore the same as if the Commissioner had made his determination, mailed the deficiency notice, and made the assessment and collection within the original statutory period of five years after the returns for the years 1918 and 1920 were filed.

Plaintiff is not entitled to recover and the petitions are dismissed. It is so ordered.

WHITAKER, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

CHAMPION RIVET COMPANY v. THE UNITED STATES

(No. 42135. Decided December 4, 1939)

On the Proofs

Income tax; premature assessment and collection.—It is held that plaintiff is not entitled to recover for the reasons stated in *Lehigh Portland Cement Company* v. *The United States*, *ante*, p. 36.

Same; withdrawal of petition.—Where taxpayer, further, upon receipt of the Commissioner's deficiency notice, filed a petition with the Board of Tax Appeals, in accordance with the statutory procedure, but before assessment or attempted collection was made, filed a written stipulation agreeing that the petition be discontinued and withdrawn, and consenting to the assessment appealed from, it is held there can be no recovery.

Same; form of consent not material.—It is not necessary that a taxpayer use any particular form or state in any particular words its consent to deficiency assessment made by the Commissioner if consent results or may be held to be reasonably intended by what is said.

Same; consent and stipulation.—Where the taxpayer consents to the amount of the judgment to be entered by the Board of Tax Appeals in a case in which the Commissioner has determined a deficiency, and so stipulates with the Commissioner, there exists no right of appeal.

Same.—Where the taxpayer stated it desired to discontinue and withdraw its petition to the Board of Tax Appeals and consented to the assessment theretofore appealed from, waiving its

Reporter's Statement of the Case

right to proceed with the case before the Board, it is held the taxpayer cannot recover amount paid on the assessment, and interest, on the ground that the tax was prematurely assessed and collected.

The Reporter's statement of the case:

Mr. Francis R. Lash for the plaintiff.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant.

Plaintiff sues to recover income tax of $74,077.37 and interest of $2,168.53, totaling $76,245.90, with interest of about $59,471 from September 13, 1926, on the ground that the tax and interest was prematurely assessed and collected and, therefore, that the payment on September 13, 1926, was an illegal and void collection under the provisions of sections 277 and 278 of the Revenue Act of 1926 (44 Stat. 9, 58, 59) and section 607 of the Revenue Act of 1928 (45 Stat. 791, 874).

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is now, and at all the times material herein was, an Ohio corporation with its office and principal place of business in Cleveland. It is engaged in the manufacture and sale of boiler and structural rivets, and coupler and air-brake pins.

2. April 15, 1921, plaintiff filed its income and profits tax return for 1920 and thereafter timely paid the tax shown due thereon. That tax is not in controversy in this proceeding.

3. December 11, 1925, after an audit of plaintiff's return, the Commissioner sent plaintiff a registered deficiency notice advising it of his determination of a deficiency for 1920 of $74,077.37.

4. December 29, 1925, plaintiff timely filed an appeal with the United States Board of Tax Appeals from the Commissioner's determination of the deficiency. June 15, 1926, before any hearing had been held upon that appeal, plaintiff's counsel submitted a stipulation to counsel for the Commissioner which he requested the latter to file with the Board

"so that the appeal may be stricken from the calendar." The stipulation which was signed by counsel for plaintiff read as follows:

> It is hereby stipulated that the petition on file for the year 1920 be, and the same is hereby, discontinued and withdrawn, without costs, and the taxpayer hereby consents to the assessment appealed from.

The stipulation was signed by the General Counsel, Bureau of Internal Revenue, with the following notation:

> No objection is made to the entry of an order of redetermination in this appeal showing a deficiency in tax due from the taxpayer for the year 1920 in the amount of $74,077.37, being the amount appearing in the deficiency letter, a copy of which is attached to taxpayer's petition filed in this appeal.

The stipulation was thereafter filed with the Board, which, on July 26, 1926, entered the following order of redetermination:

> Under written stipulation signed by counsel for the parties to the above-entitled proceeding and filed with the Board on July 9, 1926, it is
>
> Ordered and decided that upon redetermination the deficiency for the year 1920 is $74,077.37.

5. August 21, 1926, the Commissioner signed an assessment list which included an assessment against plaintiff of the deficiency for 1920 as redetermined by the Board, together with interest in the amount of $2,168.53, a total assessment of $76,245.90, the interest assessed being computed at the rate of 6 percent per annum from the date of the enactment of the revenue act of 1926 to August 21, 1926, the date of the assessment of the tax. September 13, 1926, following receipt of notice and demand from the collector, plaintiff paid the total assessment of $76,245.90.

The "Remarks" column of the assessment list did not contain either the word "agreement" or the word "jeopardy," although it was the customary practice of the Bureau of Internal Revenue at that time to include the word "agreement" in that column in cases where the taxpayer had agreed to an immediate assessment and collection of the assessment.

and also to include the word "jeopardy" in those cases where the assessment was a jeopardy assessment.

Plaintiff never filed any written consent or waiver of the statutory restrictions upon the assessment and/or collection of the deficiency for 1920 other than the extent to which a consent or waiver might be inferred from the stipulation filed with the Board and referred to in finding 4. Nor did plaintiff take any action to enjoin the making of the assessment or collection.

6. March 4, 1930, plaintiff filed a claim for refund of the entire amount assessed and paid, as set out in the previous finding, and assigned the following basis therefor:

> The tax ($74,077.37) and interest ($2,168.53) was assessed and collected after five years after the return for year 1920 was filed. The return for year 1920 was filed on or before April 15, 1921, and the tax was assessed in August 1926, and collected September 13, 1926. At the time the tax was assessed legal assessment was barred by Sections 277 and 278 of the Revenue Act of 1926, and may be refunded in accordance with Section 607 of the Revenue Act of 1928.

The Commissioner disallowed that claim on a schedule dated July 11, 1930, and advised plaintiff of such disallowance in a letter of the same date.

7. September 11, 1930, plaintiff filed a further claim for refund which assigned as one ground that "The deficiency was assessed and/or collected at a time when the act of so doing was prohibited or not permitted by the revenue laws." The Commissioner disallowed that claim on a schedule dated December 26, 1930, and advised plaintiff of his action in a letter of the same date. These refund claims are made a part of these findings by reference.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The contentions of plaintiff in this case are the same as the contentions advanced by it in support of its claimed right to recover the tax assessed and collected in *Lehigh Portland*

Cement Company v. *United States*, Nos. 41974 and 42116, decided this date, *ante*, p. 36. For the reasons stated in the opinion in these cases, we hold that plaintiff is not entitled to recover in this case.

Upon the particular facts disclosed by the record in this case, there are additional reasons why recovery cannot be had. The facts show that upon receipt of the Commissioner's deficiency notice plaintiff filed a petition with the U. S. Board of Tax Appeals and that before any assessment or attempted collection was made, the plaintiff, on June 15, 1926, filed with the Commissioner's counsel a written stipulation signed by it which went to the Commissioner's office with the record in the case, and which stipulation plaintiff requested the Commissioner to file with the Board of Tax Appeals "so that the appeal may be stricken from the calendar." In this written stipulation and consent the taxpayer agreed that the petition on file with the Board for 1920 be discontinued and withdrawn and stated that "the taxpayer hereby consents to the assessment appealed from." The Commissioner made a notation upon the written request, stipulation, and consent of the taxpayer that he had no objection to the same and to the entry of an order by the Board redetermining the deficiency in the amount which he had determined and of which he had duly notified the taxpayer. Accordingly, on July 26, 1926, the Board, pursuant to plaintiff's written consent, entered judgment for the deficiency of $74,077.37. This written stipulation by plaintiff was a plain agreement to the deficiency determined by the Commissioner and we think it was also a consent to its immediate assessment and collection. Obviously the plaintiff's written consent could have had no other purpose, unless the appeal had been filed purely for the purpose of delay, which the statute condemns. See section 1000, Title X, Revenue Act of 1926 (44 Stat. 9, 105), amending section 900 of the Revenue Act of 1924 (43 Stat. 253, 336). It is not necessary that a taxpayer use any particular form or state its consent by the use of any particular words if consent results or may be held to be reasonably intended by what is said. In this case the taxpayer stated that it de-

Syllabus

sired to discontinue and withdraw its petition and consent to the assessment appealed from. This can only mean that the taxpayer was waiving its right to proceed with the case before the Board and consenting to assessment of the deficiency, in respect of which the petition had been filed with the Board. The waiver was not conditional. Compare *Columbia Carbon Co. et al.* v. *United States*, 77 Ct. Cls. 768. In a case like the one at bar, or where the taxpayer consents to and stipulates with the Commissioner with respect to the amount of the judgment to be entered by the Board in a case in which the Commissioner has determined a deficiency, there exists no right of appeal, for a taxpayer cannot appeal from a judgment of the Board of Tax Appeals to which he has expressly agreed. On August 21, 1926, almost a month after the Board's decision had been entered, the Commissioner assessed the deficiency to which the taxpayer had agreed, together with interest to the date of assessment. Any further delay in assessing would only have resulted in the payment of a greater amount of interest by plaintiff. Thereafter, on September 13, 1926, upon receipt of notice and demand from the collector, plaintiff paid the amount of tax and interest assessed. Plaintiff did not at any time seek to enjoin collection, even if it might have done so in the circumstances.

Plaintiff is not entitled to recover, and the petition is dismissed. It is so ordered.

WHITAKER, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

BERLINER HANDELS-GESELLSCHAFT v. THE UNITED STATES

[No. 42452. Decided December 4, 1939]

On the Proofs

Capital stock excise tax; foreign corporation engaged in business in United States.—Where foreign corporation did not engage in one single activity nor in sporadic activities, but its activities

were continuous and involved sundry transactions for gain and profit; and where, although it did not maintain an office or place of business in the United States but all of its transactions involving purchases and sales of securities, collections and deposits, and other monetary transactions, were handled through domestic bankers and brokers, it is held that said foreign corporation was "engaged in business" in the United States within the meaning of section 38 of the Revenue Act of 1909.

Same; distinction between capital stock tax and income tax.—A capital stock tax is a tax upon the privilege of doing business in a corporate capacity and the tax in question here was based on income derived from operating as a corporation whereas an income tax is based on the receipt of income however derived.

Same; "engaged in business."—The phrase, "engaged in business," is a most comprehensive term and embraces everything which a corporation may be engaged in for profit.

Same.—A single activity would not constitute "engaging in business."

Same; corporation activities.—When a corporation is organized for the purpose of profit-making activities and engages in such activities, it is subject to the capital stock tax.

Same; domestic and foreign corporations.—Under the statute there is no difference between a domestic and a foreign corporation which would give the foreign corporation a distinct advantage because it did not maintain an office or agent in this country.

The Reporter's statement of the case:

Mr. Raymond T. Heilpern for the plaintiff. *Messrs. Maxwell C. Katz* and *Otto C. Sommerich* and *Katz & Sommerich* were on the brief.

Mr. S. E. Blackman, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows.

1. The plaintiff, Berliner Handels-Gesellschaft, is a banking firm organized under the laws of Germany July 2, 1856, and is an independent legal entity.

There are two classes of persons in the firm, to wit: shareholders and managers. The shareholders' contributions of capital are evidenced by certificates of stock and the liability

of the shareholders is limited to the stipulated value of the shares. The managers, who, in a stock corporation, would be the managing committee, are liable with their entire property for the liabilities of the company. This liability arises only in the event of the company's bankruptcy. It is secondary to that of the company. During all times relevant hereto, the managers were determined by an administrative board. The administrative board occupied a relationship to the managers of the firm analagous to that between the board of directors of an American corporation and its officers.

The firm was authorized to do a general banking, commercial, and industrial business and to establish branches, subsidiaries, and agencies.

2. On April 24, June 6, and August 24, 1931, in accordance with demands made upon the plaintiff by the Commissioner of Internal Revenue, the plaintiff filed with him at Washington, D. C., under protest, various statements concerning its income for the calendar years 1909, 1910, 1911, and 1912, and for the first two months of 1913.

3. March 8, 1932, the Commissioner addressed a 30-day letter to the plaintiff in which it was notified that its corporation excise tax liability for the taxable period comprising the years 1909, 1910, 1911, and 1912 and the first two months of 1913 disclosed that taxes and penalties were due from it for such period in the following amounts:

Year	Net income	Deficiency	Penalty
1909	$164,361.35	$1,643.61	$821.81
1910	192,303.46	1,923.03	961.52
1911	401,800.33	4,018.00	2,009.00
1912	174,118.03	1,741.18	870.59
1913	178,104.97	1,776.05	888.03

4. May 1, 1932, the Commissioner, pursuant to the provisions of Section 3176 of the Revised Statutes, prepared tax returns for the plaintiff which show the following with respect to its entire net income, over and above $5,000, received by it from business transacted and capital invested within the United States and its territories during the taxable period.

	1909	1910	1911	1912	1913
Gross income:					
From operations	$43, 711. 77	$95, 897. 33	$145, 416. 46	$41, 410. 11	$50, 202. 81
From interest	131, 402. 99	141, 265. 25	267, 087. 86	139, 500. 16	146, 106. 84
From dividends received	147. 75	35, 800. 00	21, 000. 00	None	None
Total gross income	175, 262. 51	272, 962. 58	433, 504. 32	180, 910. 27	196, 309. 65
Total deductions	5, 901. 16	75, 659. 12	26, 703. 99	1, 792. 24	18, 204. 68
Net income	169, 361. 35	197, 303. 46	406, 800. 33	179, 118. 03	178, 104. 97
Exemption	5, 000. 00	5, 000. 00	5, 000. 00	5, 000. 00	None
Net income	164, 361. 35	192, 303. 46	401, 800. 33	174, 118. 03	178, 104. 97
Tax assessable	1, 643. 61	1, 923. 03	4, 018. 00	1, 741. 18	1, 781. 05

5. For the taxable period plaintiff was assessed by the Commissioner in the following several amounts, by year, in August 1932, and the taxes, penalties, and interest were collected from the taxpayer in their entirety August 20, 1932, by credit against an overassessment for 1917:

Year	Tax	Penalty	Interest	Total
1909	$1, 643. 61	$821. 81	$639. 54	$3, 104. 96
1910	1, 923. 03	961. 52	748. 27	3, 632. 82
1911	4, 018. 00	2, 009. 00	1, 563. 44	7, 590. 44
1912	1, 741. 18	870. 59	677. 51	3, 289. 28
1913	1, 781. 05	890. 53	693. 02	3, 364. 60
	11, 106. 87	5, 553. 45	4, 321. 78	20, 982. 10

6. February 2, 1933, the taxpayer filed, with the appropriate collector of internal revenue, claims for refund for the taxable period in question, applying to the respective years in amounts as follows:

Year:	*Amount claimed*
1909	$3, 104. 96
1910	3, 632. 80
1911	7, 590. 44
1912	3, 289. 28
1913	1, 331. 01
Total	18, 948. 49

The basis claimed by the taxpayer for refund was stated in the several claims as follows:

> The Berliner Handels-Gesellschaft, during the year 1909, was a corporation existing by virtue of the laws of the Empire of Germany (now the Republic of Germany). During the year 1909, the said taxpayer was

not doing business in the United States of America as contemplated by Section 38 of the Act of 1909.

The taxpayer herein, during the year 1909, maintained no office in this country for the transaction of its business, nor did it have any agent acting for it in the United States of America. Its income from the United States was obtained as follows:

a. The taxpayer had cash accounts with American banks which served the purpose of effecting payments in this country for the account of its clients.

b. The taxpayer did an arbitrage on a joint account with American banks in those securities which were dealt in in Berlin as well as New York.

c. The taxpayer bought and sold for investment, stocks and bonds for its own account and for the account of its customers.

d. The purchases of the taxpayer for investment for its own account exceeded to a great extent the sale of securities made by the taxpayer.

e. The income received from the investment made by the taxpayer was deposited to its account in American banks.

The above, in effect, represents the nature of the business of the taxpayer during the year 1909 as effected in the United States of America. Therefore, the taxpayer herein was not engaged in or doing business in the United States of America, so as to subject it to the tax imposed by Section 38 of the Act of 1909.

7. By letters dated February 28, 1933, the Commissioner notified the taxpayer that its claims for refund for the taxable period, amounting to $18,948.49, were rejected, on the ground that "the taxpayer bought, sold, and held in New York, large amounts of securities for account of itself and others, deposited large sums with New York bankers and brokers for the purpose of such trading, transferred money and securities from place to place as market conditions were most favorable, and that as the result of all these transactions the taxpayer made substantial profits and that in addition to the above, it received interest from bonds and from credit balances and that the taxpayer was a corporation organized under the laws of Germany."

No part of the amount thus claimed and rejected has been refunded.

8. During the taxable period involved herein the plaintiff received income from business transacted and capital invested within the United States in the manner described in this and succeeding findings.

Plaintiff maintained accounts with stock-brokerage houses in the city of New York, certain of which also did a private banking business. To or through these houses plaintiff made loans and from or through them borrowed money. The interest paid or received thereon was as follows:

	Received	Paid
Hallgarten & Co	$39, 550. 35	$102, 911. 76
Ladenburg, Thalmann & Co	494. 46	None
Speyer & Co	446. 61	130. 94
Kuhn, Loeb & Co	109. 92	42, 995. 91
J. & W. Seligman & Co	27. 90	None
Goldman, Sachs & Co	40. 35	None
National Bank of Commerce	None	42, 225. 64
Equitable Trust Co	None	5, 222. 22
Guaranty Trust Co	60. 93	None
Newborg & Co	256. 60	906. 84
Hanover National Bank	87. 46	None
Seligman & Meyer	3. 46	None
	41, 078. 04	194, 393. 31

The interest paid exceeded that received by $153,315.27. The major borrowings were from Hallgarten & Co., Kuhn, Loeb & Co., and National Bank of Commerce, for individual loans of $500,000 or $1,000,000, for various terms, at interest ranging from 4% to 4¾%.

The total major borrowings, outstanding during the periods indicated, varied in the following amounts:

September 18, 1911, to October 17, 1911	$1, 000, 000
October 17, 1911, to October 24, 1911	1, 500, 000
October 24, 1911, to October 30, 1911	2, 000, 000
October 30, 1911, to January 18, 1912	3, 000, 000
January 18, 1912, to January 31, 1912	2, 000, 000
January 31, 1912, to March 15, 1912	1, 500, 000
March 15, 1912, to March 18, 1912	3, 000, 000
March 18, 1912, to April 22, 1912	3, 500, 000
April 22, 1912, to June 17, 1912	3, 000, 000
June 17, 1912, to September 17, 1912	2, 500, 000
September 17, 1912, to October 28, 1912	2, 000, 000
October 28, 1912, to November 15, 1912	1, 000, 000
November 15, 1912, to November 19, 1912	500, 000

9. Plaintiff kept a regular brokerage account with Newborg & Co., stock exchange brokers, and gave orders to Newborg & Co. to buy and sell securities.

Plaintiff, jointly with Kuhn, Loeb & Co., purchased shares of railway stock on a basis of 40% of the purchase price to be paid by Kuhn, Loeb & Co. and 60 % by the plaintiff. In this transaction plaintiff contributed $2,312,000.

Plaintiff entered into joint accounts with Hallgarten & Co. for the purpose of dealing in an aggregate of $1,274,000 face amount of New York City 4¼% bonds, whereby each participated equally in gains or losses.

Plaintiff also acted, jointly with others in a banking group, as readjustment and syndicate managers in the union of two Mexican railway companies, profits, losses, commissions, and participations in proportion agreed upon. In this venture plaintiff was represented by Hallgarten & Co. as its agent.

10. A large part of plaintiff's transactions in the United States consisted of participation in syndicates underwriting the issuance of new securities. These syndicates were formed by banking houses and at their invitation were participated in by the plaintiff. In some cases plaintiff was a member of the syndicate, in others it participated indirectly under a syndicate member. The amount of plaintiff's participation, or subparticipation as the case is, with description of the security, follows:

Description of security:	*Plaintiff's participation or subparticipation*
Bethlehem Steel 6% 5-yr. notes $7,500,000	$100,000
Durham Coal & Iron 5% bonds $3,000,000	250,000
Common shares (bonus) $1,500,000	125,000
Chicago Northwestern 4% general gold bonds due 1987 $15,000,000	150,000
Chicago, Milwaukee & Puget Sound 4% mortgage gold bonds $25,000,000	200,000
Chesapeake & Ohio 4½% gold bonds $31,390,000	150,000
Bethlehem Steel first lien and refunding mtge. 5% bonds $15,200,000	250,000
Canada Southern 5% gold bonds Ser. A $2,500,000 up to a maximum of $22,500,000	175,000
Baltimore & Ohio 4½% convertible bonds $63,250,000	75,000

Reporter's Statement of the Case

Description of security—Continued.	*Plaintiff's participation or sub-participation*
Milwaukee, Sparta & Northwestern 4% first mtge. bonds $15,000,000	100,000
Southern Pacific Common shares $126,650,000	500,000
Texas Co. 20,000 shares	(250 shares)
M. Rumely Co. preferred shares and bonus $8,000,000	$100,000
Common shares $800,000	10,000
Option on $2,000,000 preferred shares	25,000
Taking over of $800,000 common shares	10,000
Option on $1,000,000 common shares	12,500
Southern Pacific guaranty syndicate for $44,500,000 4% convertible bonds	200,000
Southern Ry. development & gen. mtge. 4% gold bonds $21,333,000	60,000
Lackawanna Steel guaranty for taking over—	
$10,000,000 5% first mtge. bonds	$75,000
5% conv. 5-yr. debentures $10,000,000	75,000
Missouri Pacific guaranty for $29,806,000 5% gold bonds	150,000
St. Louis & San Francisco 3-yr. 5% notes $8,000,000	250,000
Brooklyn Rapid Transit 5% bonds due 1918	50,000
Natl: Rys. of Mexico 4½% bonds due 1957 $24,000,000	1,632,000
One-year loan due Nov. 15, 1912, $30,000,000	956,800
One-year note due Nov. 15, 1913, $30,000,000	909,477

11. Up until about the end of the year 1912 plaintiff kept on deposit with Hallgarten & Co. securities for plaintiff's account, which were listed in the depository's books, and an account kept of dividends and interest collected. These securities and the accounting thereof were then transferred to The Hanover National Bank of New York City. They were acquired, used, or disposed of in this account solely on instructions from plaintiff in Berlin.

12. Plaintiff maintained no office or other place of business in the United States, its territories, or possessions, and it did not have therein a general agent.

Its purchases and sales of securities, or their disposition otherwise, the collection and deposit of interest and dividends, the safekeeping of securities, its banking and brokerage business were handled by banks or brokerage houses in New York City whose organizations were independent of plaintiff's, and beyond ordinary banking and brokerage business plaintiff's New York City correspondents had no authority to manage its business affairs. No contracts affecting

business in the United States were signed by plaintiff except in Berlin, and no purchases or sales of securities were made without specific instructions from the plaintiff in Berlin.

During the taxable period Hallgarten & Co. acted as plaintiff's principal foreign correspondent in its banking business. A limited partner of Hallgarten & Co. was Carl Fuerstenberg, who was also one of the managers of the plaintiff. At no relevant time was Carl Fuerstenberg in the United States. A stepson of Carl Fuerstenberg, Ludwig Treitel, was a general partner of Hallgarten & Co.

Carl Fuerstenberg's contribution to the capital account of Hallgarten & Co. was paid by the plaintiff and his share in the profits of Hallgarten & Co. went to the plaintiff.

Other banks acted as plaintiff's foreign correspondents, transfers from one to the other were made by the plaintiff, and collections and payments for the account of plaintiff's customers were effected through them.

Plaintiff did some limited advertising in the United States as a German banking house and in the advertisements gave Berlin as its address.

13. The average annual income received by plaintiff from business transacted and capital invested within the United States in the manner heretofore described during the taxable period involved averaged approximately seven and one-half percent of the total average net profits of the plaintiff during the years in question.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

Plaintiff brings this action to recover excise taxes levied on this foreign corporation by the Commissioner of Internal Revenue on the income of plaintiff derived from engaging in business in the United States during the years 1909, 1910, 1911, 1912, and the first two months of 1913, under Section 38 of the Tariff Act of 1909 (36 Stat. 11, 112), which reads as follows:

> That every corporation, joint-stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now

Opinion of the Court

or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint-stock company or association, or insurance company equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint-stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint-stock companies or associations, or insurance companies, subject to the tax hereby imposed. (36 Stat. 112.)

This section levies a capital-stock tax on domestic and foreign corporations of "one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year * * *" and in the case of plaintiff corporation upon the "amount of net income over and above five thousand dollars received by it from business transacted *and capital invested* within the United States * * *." [Italics ours.]

The real question presented is, under the facts of this case: Was the plaintiff "engaged in business" within the meaning of the foregoing statute and therefore subject to the excise tax for engaging in business in this country? The Commissioner of Internal Revenue found that plaintiff was subject to the tax and denied the claim for refund.

A capital-stock tax is a tax upon the privilege of doing business in a corporate capacity and is based on income derived from operating as a corporation whereas an income tax is based on the receipt of income however derived. *Flint* v. *Stone Tracy Company*, 220 U. S. 107.

Opinion of the Court

The phrase "engaged in business" is a most comprehensive term and embraces everything which a corporation may be engaged in for profit. When a corporation is organized for the purpose of profit-making activities, and engages in such activities, it is subject to the capital-stock tax. It is not denied that plaintiff engaged in numerous and sundry activities in the pursuit of profit and gain, and if it were a domestic corporation there could be no question that it was subject to the tax.

Plaintiff did not engage in a single activity nor did it engage in sporadic activities, but, on the contrary, during the years in question its activities were continuous and involved large sums of money and numerous and sundry transactions, all of which were for the purpose of gain and profit. Plaintiff did not maintain an office or place of business in the United States, its territories, or possessions, and did not have a general agent in this country. All of its purchases and sales or other disposition of securities, its collections, and deposits of interest and dividends, and the safekeeping of securities were handled by bankers, and brokerage and investment houses in New York City. No purchases, sales, or other disposition of such securities were made without special instructions from the bank in Berlin. Plaintiff maintained accounts in various stock brokerage houses in the City of New York, several of which did a private banking business. Plaintiff loaned moneys to these firms and at times borrowed from or through them, paying and receiving interest. It maintained purchasing accounts and gave its orders for purchases and sales of securities. It purchased stock on joint account with another firm and in these transactions contributed over two million dollars. Plaintiff entered into a joint account with another firm for the purpose of dealing in New York City bonds. It acted jointly with others in a banking group, as readjustment and syndicate managers, in the union of two Mexican railway companies, participating in the profits, losses, and commissions. It participated in syndicates underwriting the issuance of new securities upon the invitation of banking and investment houses which formed these syndicates. Plaintiff advertised in this country for business, giving its home

address in Berlin. It purchased and paid for, out of its own funds, a limited partnership for one of its officers in Hallgarten & Company, but the profits earned by Hallgarten & Company, to which this limited partner was entitled, were not paid to the limited partner, but all of these profits were paid directly to plaintiff.

A corporation cannot enter into a partnership and therefore it was necessary to name one of its officers as a partner but, as a matter of fact, and what actually occurred was, plaintiff provided the funds with which this partnership was purchased and received all the profits earned by this partner who was an officer of plaintiff. In substance, plaintiff was the real partner but, in form, the officer of plaintiff was named as the partner. Hallgarten & Company received and paid interest, loaned money, entered into joint accounts for dealing in New York City bonds, acted jointly with other banking groups as readjustment and syndicate managers in the union of two Mexican railway companies and participated in the profits, losses, and commissions, in the proportions agreed upon, and kept on deposit securities for plaintiff's account.

It is apparent from these many profit-making activities through Hallgarten & Company and the varied nature of these transactions that this company, in which plaintiff's officer held a limited partnership, was the one through which plaintiff chiefly conducted its business.

Plaintiff's sole contention is that, having no place of business in the United States and no office or agent in this country, it is immaterial what amount of business it may do through several bankers, brokerage and investment houses or otherwise, and it is not "engaged in business" because there is no one in this country on whom process may issue. An examination of the statute shows that there is no difference made between a domestic and a foreign corporation which would give the latter a distinct advantage over the former because of the fact it did not maintain an office or agent or have a place of business in this country.

We feel that the intention of Congress in levying this tax was to require a corporation engaged in business to pay for the privilege, irrespective of the fact of whether or not

it maintained a place of business or had an office or agent in this country. It comes down to a question of the amount of business done. A single activity would not constitute "engaging in business." *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, 35.

But we have no such case here. It is admitted that during the four years and two months in question plaintiff was continuously engaged in business activities of various sorts involving millions of dollars and numerous and frequent transactions with many firms and banks.

Plaintiff mainly relies on the case of *Union Internationale de Placements* v. *Hoey*, 96 Fed. (2d) 591. The opinion was written by Circuit Judge Martin Manton and although the term "engaged in business" is most comprehensive for taxation purposes, nevertheless, he holds it is essential that a foreign corporation have a place of business or a branch office or an agent or representative in this country on whom process can be served, no matter how numerous and continuous its activities in seeking gain and profit and how large and multifarious its investments, to subject it to an excise tax levied on foreign corporations for the privilege of doing business. We do not feel that this is *sine-qua-nonical.* The activities of the plaintiff in the instant case differ so widely from those in the case decided by Judge Manton that there is no parallel.

It has been held that each case should stand on its own facts. In *Von Baumbach* v. *Sargent Land Company*, 242 U. S. 503, 516, in dealing with former cases, the Supreme Court said:

> * * * The fair test to be derived from a consideration of all of them is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes.

Plaintiff was not engaged solely in banking business, but its transactions were more extensive and varied. *Bank of America* v. *Whitney Bank*, 261 U. S. 171.

There is not before us the question of service of process in order to gain jurisdiction over plaintiff, but the right to collect the excise tax based on the privilege to corporations to engage in business for the purpose of gain or profit.

We feel that the facts clearly show that the continuous and active participation in numerous and frequent transactions and various business undertakings constituted being "engaged in business," as defined by the statute, and therefore, the plaintiff can not recover and its petition is dismissed. It is so ordered.

WHITAKER, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

VIRGINIUS G. DUNNINGTON v. THE UNITED STATES

[No. 42507. Decided December 4, 1939]

On the Proofs

Income tax; consent to deficiency assessments.—Where plaintiff, having filed a timely petition with the Board of Tax Appeals, later filed a motion to dismiss its appeal, and in that motion set forth that it consented to assessment of the deficiency as determined by the Commissioner, it is held that plaintiff is not entitled to recover, on the authority of Lehigh Portland Cement Company, *ante*, p. 36.

Same; right to collect.—Taxpayer's consent to assessment of deficiency carried with it the right to collect.

The Reporter's statement of the case:

Mr. Francis R. Lash for the plaintiff.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant.

In this case plaintiff seeks to recover $11,735.39 with interest, representing a deficiency in tax of $9,269.14 and interest of $2,468.19 paid for 1922.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. March 15, 1923, plaintiff filed his income-tax return for 1922 wherein he reported a net loss and no tax due for that year.

Thereafter, after an audit of that return in connection with a revenue agent's report thereon and conferences held with respect thereto, the Commissioner mailed to plaintiff a deficiency notice on February 2, 1927, advising him of his determination of a deficiency for 1922 of $9,269.14 and also of an overassessment for 1923 of $1.94.

2. March 31, 1927, plaintiff appealed to the United States Board of Tax Appeals from the Commissioner's determination. However, no hearing was ever had before the Board on that appeal. November 5, 1927, plaintiff's counsel filed with the Board a motion to dismiss reading as follows:

> WHEREAS your Petitioner has decided not to prosecute this case further;
>
> AND WHEREAS, said Petitioner now consents to the assessment of the Deficiency set forth in Sixty Day Department Letter from the Commissioner of Internal Revenue, dated February 2, 1927, viz:

	Deficiency in Tax	*Over-assessment*
1922	$9, 269. 14	-----
1923	---------	$1. 94

> IT IS HEREBY MOVED that the Petition be dismissed.

A duplicate copy of that motion was served upon the General Counsel of the Bureau of Internal Revenue who was representing the Commissioner before the Board.

3. November 30, 1927, the Board entered the following order of dismissal:

> This proceeding having been called from the Day Calendar of November 30, 1927, on motion of counsel for the petitioner to dismiss the proceeding, without objection by counsel for the respondent, it is hereby
>
> ORDERED that the motion be and the same is hereby granted and the proceeding dismissed. The amount of the deficiency is $9,269.14 for the year 1922 as determined by the Commissioner.

Reporter's Statement of the Case

4. January 7, 1928, the Commissioner signed an assessment list which included an assessment against plaintiff of a deficiency for 1922 of $9,269.14 and interest thereon of $2,468.19, that is, a total of $11,737.33. The interest assessed represented interest upon the deficiency prorated to the four installment dates at the rate of 6 percent per annum from the installment dates in 1923 to January 7, 1928, the date of the assessment of the tax.

The assessment list contained a notation: "Collector: Withhold demand pending comparison 1923 overassessment." The making of the assessment and the crediting of the overassessment for 1923, after having been determined to be an overpayment, were carried out under the offset practice which was being followed in the Internal Revenue Bureau at that time as outlined in finding 18 in the case of the *Eastman Kodak Co.* v. *United States*, 82 C. Cls. 504, 518. The "Remarks" column of the assessment list did not contain either the word "agreement" or the word "jeopardy," although it was the customary practice in the Bureau of Internal Revenue at that time to include the word "agreement" in that column in cases where the taxpayer had agreed to an immediate assessment and collection of the assessment and also to include the word "jeopardy" in those cases where the assessment was a jeopardy assessment.

Plaintiff never filed any written consent or waiver under section 274 (a) of the statutory restrictions upon the assessment and/or collection of the deficiency for 1922 other than the extent to which a consent or waiver might be inferred from the motion to dismiss filed with the United States Board of Tax Appeals.

5. The assessment list was received in the office of the collector at Baltimore, Maryland, on or prior to January 11, 1928, and on February 20, 1928, the collector issued a notice and demand for payment of the total assessment less $1.94, the overassessment for 1923; that is, $11,735.39. In the meantime, January 24, 1928, the Commissioner signed a schedule of overassessments allowing an overassessment in favor of plaintiff for 1923 of $1.94, and on the same day that amount was applied as a credit in partial satisfaction of the deficiency assessed for 1922.

March 1, 1928, plaintiff paid $3,735.39 of the above assessment, and following the issuance by the collector, on March 23, 1928, of a warrant of distraint for the balance of the assessment, plaintiff paid such balance in four equal installments of $2,000 on June 3, September 6, and December 12, 1928, and March 6, 1929.

6. On his March 1929 assessment list the Commissioner assessed $641.33 as additional interest due under section 250 (e), Revenue Act of 1921, for failure on the part of plaintiff to pay the deficiency assessment for 1922 within ten days after notice and demand therefor, such amount being at 1 percent per month. April 8, 1929, plaintiff filed with the collector an offer in compromise with respect to such interest reading in part as follows:

> The sum of $320.67 is hereby tendered voluntarily with request that it be accepted as a compromise offer and that release be granted the undersigned from the following liability resulting from the violation or failure specified: In lieu of 12% interest, the above amount being equivalent to 6% interest.
>
> The following facts and reasons are submitted as grounds for acceptance of the offer: The government was put to no expense in making the collection, the installment payments having been voluntarily made by the taxpayer out of current earnings as at the time the additional tax was assessed the taxpayer was unable to pay in full. The imposition under such circumstances of interest at 12% imposes an undue hardship on the taxpayer.

On the same day the collector recommended that the offer in compromise be accepted and forwarded it to the Commissioner for his approval. May 9, 1929, the Commissioner notified plaintiff of his acceptance of the offer in compromise, his letter of that date reading in part as follows:

> The Commissioner of Internal Revenue has considered the proposition and decided under date of May 1, 1929, with the advice and consent of the Secretary of the Treasury, to accept the amount heretofore paid and deposited in full settlement of the liability above described.

7. March 10, 1931, plaintiff filed a claim for refund of $11,737.33, the tax and interest theretofore paid for 1922 as

heretofore shown, the basis of such claim reading in part as follows:

> The deficiency in tax was assessed and/or collected at a time when the act of so doing was prohibited, or not permitted, by the Revenue Laws.
>
> * * * * *
>
> It is therefore claimed that the assessment and/or collection were made in violation of the provisions of the Internal Revenue Laws, relating to the matter. Of the Revenue Act of 1926, particular sections which have been violated or not complied with are 283 (a), 274 (h), 274 (a), 274 (b), 277 (a) (2), and 278 (d).
>
> An overpayment has thus been made and claim for refund is therefore hereby made under the provisions of Section 284 of the Revenue Act of 1926 and/or under the provisions of Section 3228 of the Revised Statutes for the refund thereof, plus interest thereon as provided by law.

8. July 9, 1931, the Commissioner advised plaintiff that his claim for refund for 1922 would be disallowed, giving reasons therefor, and September 4, 1931, the Commissioner advised plaintiff that the claim was disallowed on a schedule of that date. These notices are made a part hereof by reference.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

In this case it appears that the Commissioner determined a deficiency in respect of the tax of plaintiff for 1922 and on February 2, 1927, mailed to plaintiff a deficiency notice. Within sixty days thereafter plaintiff filed a petition with the Board of Tax Appeals and on November 5, 1927, filed with the Board a motion to dismiss its appeal on the ground that it did not desire further to prosecute the same, and, in that motion, plaintiff set forth that it consented to assessment of the deficiency set forth in the Commissioner's deficiency notice of February 2, 1927. A duplicate copy was mailed to the General Counsel who was representing the Commissioner before the Board. Accordingly the Board entered a judgment on November 30, 1927, and on January 7, 1928, the Commissioner assessed the deficiency, together with interest

to date of assessment. Thereafter, on February 20, 1928, the collector mailed to plaintiff a notice and demand for payment of the assessment less a certain overassessment for another year, and on March 1, 1928, plaintiff paid a portion of the amount assessed and the balance was paid on certain dates between June 3, 1928, and March 6, 1929.

On these facts it is clear that plaintiff is not entitled to recover. The plaintiff specifically consented on November 5, 1927, to assessment of the deficiency determined by the Commissioner. This consent justified the Commissioner in assessing and collecting the tax. The taxpayer's consent to assessment of the deficiency as determined by the Commissioner carried with it the right to collect. He specifically agreed to the deficiency and there was thereafter no basis for any objection by him to its assessment and collection. No objection was made to the assessment or collection until March 1931. See *Lehigh Portland Cement Company* v. *United States*, decided this date; *ante*, p. 36.

Plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

WHITAKER, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

B. F. STURTEVANT CO. v. THE UNITED STATES

[No. 42511. Decided December 4, 1939]

On the Proofs

Government contract; changes made by defendant to remedy defects.—Plaintiff under a contract with the Navy Department manufactured 16 forced-draft blowers for use in the cruisers *Louisville* and *Chicago*, then under construction. The contract provided that all 16 blowers be delivered by March 1, 1929, with no penalty provision for delayed delivery. Eight of the blowers were delivered to the Navy Yard at Puget Sound, Washington, June 15, 1930, and 8 were delivered to the Navy Yard, at Mare Island, California, 7 on August 9, 1930, and 1 on September 5, 1930; all of the 16 blowers having been tested and inspected by 3 competent naval inspectors, before shipment, at the Boston Navy Yard, and the official naval stamp having been placed on the machines. Upon delivery to the

Reporter's Statement of the Case

Navy Yards at Puget Sound and Mare Island, respectively, blowers were subjected to tests and inspections which disclosed defects, being out of balance dynamically, and having other faults, all of which were officially called to the attention of plaintiff. After correction by the Navy Yard employes of discoverable defects and certain other changes and repairs, the blowers were finally installed in the cruisers and have since operated satisfactorily at the required speeds. The Navy Department, in its settlement with plaintiff-contractor, deducted from the contract price the cost of making the repairs and changes which were necessary to make them conform to the provisions of the contract. The plaintiff sues for the recovery of the amount so withheld.

Held: There was no unwarranted deviation by the defendant from the terms of the contract and specifications in remedying and correcting the defects found to exist in the blowers upon delivery.

Same.—Changes in a manufactured article may not arbitrarily be made and charged to the contractor's account.

Same.—In the instant case, it is held that no proof is submitted to show that plaintiff sustained any damage by reason of action of defendant.

The Reporter's statement of the case:

Mr. Cornelius R. Bull for the plaintiff.

Mr. Wm. A. Stern, with whom was the *Assistant Attorney General*, for the defendant.

Plaintiff sues to recover $6,623.55 alleged to be the balance due under a contract pursuant to which plaintiff agreed and undertook to manufacture and furnish sixteen (16) forced draft blowers for the Navy Department in accordance with the terms of the contract and certain specifications made a part thereof. The amount sought to be recovered was deducted by the defendant from the total contract price of $75,640 as the amount which it was necessary for the Navy Department to expend to correct certain inherent defects in the blowers, before final acceptance thereof at point of delivery.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. On August 6, 1928, plaintiff, a Massachusetts corporation, entered into a contract with the defendant. It was

signed on behalf of the defendant by the Purchasing Officer, Bureau of Supplies and Accounts, Navy Department. The contract and accompanying specifications, which were made a part thereof, provided for the manufacture by plaintiff of 16 forced draft blowers, together with certain spare parts, for $75,640. The contract provided that all 16 blowers were to be delivered by March 1, 1929. The contract contained no penalty provision for delayed delivery. Eight of the blowers were delivered by plaintiff to the Navy Yard, Puget Sound, Washington, June 15, 1930. Eight were delivered to the Navy Yard at Mare Island, California, seven of them being delivered August 9, 1930, and one of them September 5, 1930. Plaintiff knew that the blowers were to be used for the purpose of furnishing forced air drafts for the cruisers *Louisville* and *Chicago*, the cost of each cruiser being about $15,000,000. Plaintiff's failure to deliver the blowers as provided by the contract delayed the construction of said cruisers. The contract and specifications are of record as plaintiff's exhibits 1 and 2, and are by reference made a part hereof.

During the period of 30 years prior to the signing of the contract, plaintiff had manufactured and delivered to defendant about 1,500 forced draft blowers. However, the forced draft blowers covered by this contract differed from the other blowers theretofore furnished by plaintiff on other contracts, in that the blowers under this contract were driven by reduction gears instead of directly by a single shaft. The bearings, also, consisted of barium instead of babbitt metal theretofore used.

2. The Bureau of Engineering of the Navy Department issued "general specifications for machinery" which, by reference, is a part of this contract. Among the provisions of said general specifications for machinery are the following:

> *S1-2-a. Materials in general.*—* * * 2. Any material whether approved or not which is found defective, or unsuitable for the purpose intended shall be removed and satisfactorily replaced without extra cost to the Government, regardless of whether or not it is partially or wholly installed when its unsuitability becomes manifest.

S1-2-b. Workmanship.—* * * 1. All work shall be executed in a thorough, workmanlike, and substantial manner. The finish of all metallic surfaces shall be of the best as may be required for the particular application, and strictly in accordance with the finish indicated on approved plans, see Subsection S1-1.

2. Any unsatisfactory work, whether partially or entirely installed, shall be removed and satisfactorily replaced without extra cost to the Government.

* * * * * * *

5. Particular attention shall be given to cleanliness and protection of all parts, particularly working surfaces, and lubricating piping and passages during manufacture and after installation. All piping and castings shall be carefully cleared of sand, scale, and metallic chips and turnings.

S45-1-f. Cleanliness requirements.—1. The entire forced lubrication system must be free from dirt, rust, and all foreign matter. The use of magnetic strainers in the system for propulsion turbines is required, unless otherwise approved.

S53-1-k. Acceptance tests.—1. The turbines and motors shall be tested in accordance with the sections covering same.

2. Each forced draft impeller and shaft shall be tested for smoothness of running at all speeds, including the 25 percent overspeed test, see following paragraph.

3. Each blower unit shall be tested for strength and balance at a speed 25 percent in excess of the normal maximum during a continuous nonstop run of at least 30 minutes; this test concerns the blower unit only, and hence need not necessarily be conducted with the driving unit. Careful inspection for evidence of strain shall be made after such tests.

3. During the manufacturing process, plaintiff experienced unusual difficulty with the barium metal bearings. Plaintiff did not have proper machinery for bringing the main gears and fans into dynamic balance. From August 6, 1928, to July 15, 1930, defendant had three competent naval inspectors at the Boston Navy Yard, whose duty it was to inspect the building of the 16 blowers. F. L. Broadley was in active charge of the inspection work. After all tests and inspection, the naval inspector placed on the machines the official Naval stamp before their shipment to the Navy Yards.

The inspector made no examination of the blowers after running them in their last tests. The inspector made the test for smoothness of operation, that is, for balance, by placing his hand upon the machine while in operation. After operating the machine at plaintiff's plant, the inspector observed in the customary way whether the bearing parts disclosed overheating. The inspector concluded that the blowers satisfactorily conformed to the specifications because they did not appear to him to unduly vibrate or overheat. He, therefore, authorized their shipment. Under the contract, the final tests of the blowers were to be made by defendant after delivery to the Navy Yards at Mare Island and Puget Sound. No damage to any of the blower units occurred while in transit between plaintiff's plant at Boston, Massachusetts, and the Navy Yards at Mare Island, California, and Puget Sound, Washington. The blowers arrived at the points of delivery in the same condition in which they left plaintiff's plant.

4. August 13, 1930, Lieutenant Commander Butler, Naval Inspector at Boston, notified the vice president of plaintiff company by telephone that the Mare Island and Puget Sound Navy Yards had reported that the fans of all the blower units delivered by plaintiff were out of balance. On the same day, the Naval Inspector at Boston wired the Commandant at Mare Island Navy Yard that plaintiff strongly recommended that no change in fan weights be made prior to complete assembly of fans and machines and the steam tests made.

On August 22, 1930, Lieutenant Commander Butler wrote plaintiff as follows:

> The following are telegrams received by the Inspector from Commandants at Navy Yards, Mare Island and Puget Sound. [These were duplicates of telegrams sent to the Bureau of Engineering, Navy Department, at Washington, D. C.]
>
> "Chicago forced draft blowers. One blower given steam test in exact condition as received from contractor. Blower vibrated at and above five hundred r. p. m. Fan was then balanced on Akimoff machine and temporary weights were put on fan and blower given second steam test resulting in no repeat no vibra-

tion at all speeds. All other fans found to be out of balance dynamically. This yard proceeding same method of fan balance and steam test as employed for years with complete success on destroyer and other high speed blowers. Two blowers disassembled have oiling system clogged with foreign material, some bearings scored, some misalignment of shafts, and some minor items of poor machine work. All defective bearings clogged strainers and other parts will be forwarded to Bureau if desired. Consider sufficiently important that contractors representative witness condition found. San Francisco representative notified but awaits instructions from home office. Request Bureau approval this yard proceed correction of defects as blowers urgently needed for installation aboard ship. Yard recommends that cost of correction of defects be charged against contractor.

"Mare Island despatch 1120 1950. Blowers for *Louisville* as bad as or worse than reported by Mare Island, a complete check of all parts now underway, will forward by letter itemized report of defects and estimated cost to correct when check is completed. Due to lack of time yard proceeding to correct defects as blowers are urgently needed aboard ship. Yard concurs in Mare Islands recommendation that cost of correction of defects be charged to contractor."

Your comments on the above telegrams are requested.

On the same day Lieutenant Commander Butler also wrote plaintiff as follows:

> Referring to this office's letter #269–90 dated 22 August 1930, the Bureau of Engineering has directed the Inspector to inform your company that the Bureau has authorized the Navy Yard, Mare Island, to correct the defects reported in Mare Island telegram quoted to you in letter referred to above.

On August 26, 1930, plaintiff wrote the Inspector of Naval Material at the Boston Navy Yard as follows:

> We are in receipt of your letter of August 22nd, quoting telegrams from Mare Island and Puget Sound Navy Yards and also your August 22nd letter advising us of the Bureau's action authorizing the Navy Yards to correct defects.
>
> This matter was discussed with Commander Butler on the 25th instant. It is understood that Commander

Butler wired the Bureau of Engineering and the two Navy Yards to the effect that we tested these blowers on a structural steel test stand made up in the form of a skeleton frustrum of a pyramid and that this structure is identically the same one used for testing blowers for sister ships Scout Cruisers #26, 27, 30, and 31. It is also understood that this telegram advised that the units for Scout Cruisers #28–29, were all in good balance before they were accepted by the Naval Inspector in our plant and allowed to be shipped.

This telegram also contained a statement to the effect that the blowers for Scout Cruisers #26, 27, 30, and 31, which are identically the same, when installed in their respective ships showed signs of vibration. The shipbuilder called upon the Sturtevant Company to look into the matter and it was shown that the vibration was due to some period in the ship's supporting structure, which by the addition of another channel iron member in that support, stopped all vibration. In other words, the period of vibration of the supporting structure was put outside the speed range of the blower. With this background, it was recommended in the telegram, that the blowers for Scout Cruisers #28–29 be handled by the same procedure, namely, installed in the ship and if vibration exists on the ship's supporting structure, see if it can be taken out before condemning the blowers.

In the balancing of any high-speed, heavy-weight machine, such as these blowers, it is very essential to have a test foundation or permanent foundation of design which does not contain any period of vibration within the speed range of the blower. This we feel exists in the test structure used in our Plant, blueprints of which are enclosed herewith and copies of which were forwarded to the Mare Island and Puget Sound Navy Yards, with a letter, copy of which is enclosed.

We sincerely hope that the Navy Yards have not made any permanent changes in the balancing weights on these units for fear that those weights have tuned out some vibration in the supporting structure and when they get in the ship, something else will turn up. In other words, I think we will all agree that with a well-balanced rotating machine placed on some structure having a period of vibration within the blower speed range it is possible to obtain quite a shake in the structure and that shake might easily be tuned out of the combined blower and supporting structure by putting some weight on the rotating fan wheel which compensates for the stationary structure.

> We wish to have you know that we should be very pleased to have our San Francisco representative go to the Navy Yard as a matter of courtesy in the matter; but if he does go it must be with the understanding that he is not in any way posing as an expert on dynamic balance and, therefore, would be unable to take any responsibility in the way of advising the people in the Navy Yard who are investigating this matter. There are not many men in any large organization who are particularly skilled in dynamically balancing heavy machines operating at high speed. This concern only has two or three such men and they have been under the direct supervision of our Manager of Research who has spent considerable time and study on this subject.

During August 1930, plaintiff was listed in the Seattle, Washington, telephone directory as "B. F. Sturtevant Company." It also had certain representatives at San Francisco, California. Upon learning of the defects mentioned, and prior to August 20, 1930, defendant informed B. F. Sturtevant Company of the defects it had discovered. The navy yards made their tests for balance on an Amikoff machine designed and constructed for that purpose and regularly used by defendant. Plaintiff did not have such a testing machine at its plant.

5. Upon receipt of the eight blowers July 15, 1930, at the Puget Sound Navy Yard, an inspection was begun by Theodore Peterson, the Assistant, now Master Machinist, Inside, at that Navy Yard. Upon removal of the inspection plate on the oil reservoir, a surface inspection disclosed that the oil strainer was clogged with grit, lint, and brass cuttings from the bearings. The blowers were then dismantled and inspected. The inspection disclosed several defects in the blowers in varying degrees in each. Said defects, as enumerated by Machinist Peterson, and supplemented by defendant's exhibit No. 23, include the following:

Fans were found to be out of balance, and to have excessive amount of paint; bearings had been closed in by planing about $1/32$ of an inch from the vertical joints of the brasses and caps; bearing clearance varied from .0095 of an inch to .0135 of an inch; bearing surfaces were badly scored from grit and misalignment; shaft pinion was scored in the upper and lower pinion journals from grit

and misalignment; the main gear shafts and gears were slightly cut on the journal surfaces from dirt and grit; bearings had been closed in by planing about 1/32 of an inch off the vertical joints of the bearings, brasses and caps; the lower faces of the gear casings were out of square with the bores of the casings; the faces of the distance pieces had been machined out of parallel; the upper faces of the turbine casings had not been machined square with the axis of the turbines; the turbine rotors were in static and dynamic unbalance; the carbon packing was broken in two blowers; the oil pumps were out of line with the upper pump shafts; the oil strainers contained dirt, lint, and metal cuttings; the casings in pump shaft were worn away from 1/8 to 3/16 of an inch; the transmission casing had not been accurately machined; the clearances of the bearings were not sufficient for lubricating purposes; the blowers, with said inherent defects were not suitable for the purposes for which they were intended.

Peterson, acting under orders of the Assistant Superintendent of Machinery in the Puget Sound Navy Yard, began the work of correcting these defects. During September 1930, after the discoverable defects had been corrected, the blowers were delivered to the Master Machinist, Outside, and were installed on the Cruiser *Louisville*. During December 1930 the Master Machinist, Outside, began preliminary tests, operating the blowers at speeds from 100 to 300 r. p. m. During January 1931 certain defects became apparent, more particularly in that none of the blowers would come safely up to the speed of 1,200 r. p. m., although they were gradually worked up to a speed of between 900 and 1,000 r. p. m. The blowers developed considerable heat in the bearings at speeds between 800 and 1,000 r. p. m. On March 14, 1931, the blowers were in position on the cruiser *Louisville*, and the trial trip was begun. During the trip the blowers developed trouble, and none of them was capable of operating at the required speed of 1,200 r. p. m. During the trial trip the bearings on five blowers burned out, and caps were broken on the lower pinion bearing of two blowers. Upon its return to the Navy Yard, the blowers were again removed for further investigation and repair.

The blowers developed excessive heat in the bearings at from 1,000 to 1,100 r. p. m., and had to be closed down. Thereafter, the Master Machinist, Outside, changed the oil grooves on blower No. 6, and tests demonstrated that it operated satisfactorily when running at 1,200 r. p. m. without excessive heating. The same change was then made in the other seven blowers. All eight blowers were then installed again in the cruiser *Louisville*, and they have since operated satisfactorily at the required speeds.

The cost of making the necessary repairs at Puget Sound Navy Yard, which was charged to plaintiff, was $2,081.58. The sum was reasonable for the work performed. The repairs so made on the eight blowers, the cost of which was charged to plaintiff, were necessary in order to make them conform to the provisions of the contract.

6. August 9, 1930, defendant received from plaintiff at the Mare Island Navy Yard seven forced draft blowers; and on September 5, 1930, defendant received at that Navy Yard the eighth blower. August 12, 1930, one of the blowers in the first shipment of seven was removed from its crate. On August 18, 1930, it was placed in a testing stand for a steam test under the supervision of Roy E. Wolff, a machinist, the supervisor at Mare Island. The blower was tested after careful "servicing" and after taking necessary preliminary steps to perform said steam test. The speed of the blower was gradually increased to 500 r. p. m. at which point it developed excessive noise and vibration, and during a run of only ten minutes the bearings became overheated. Thereupon, under orders of Commander William G. Livingstone, Wolff dismantled the blower, and an inspection thereof disclosed certain defects. Among the defects, as enumerated by Supervisor Wolff and as supplemented by the contract drawings of record, are the following:

In the transmission casing, the center distance of the bore holding, bearing liners outer, and bearing liners inner, was .008 to .012 of an inch too close, and out of parallel to the bore; bearing liner outer, and bearing liner inner, were filed and scraped eccentric with outside diameter, and scored with grit and misalignment; the shaft pinion was scored, and the teeth of the pinion were cut from grit and mis-

alignment; in the gear shaft and gear, the shaft was scored and the gear teeth cut from chips and misalignment; the outer bearing liner had in it 3 to 7 dowel holes instead of one, as called for by the plans; inner bearing liner was scored from chips and misalignment; bearing liner outside was filed and scraped eccentric with the outside diameter, and scored from grit and misalignment; the bearing housing was out of line; the side bracket was machined only on one face instead of both faces as required; straight dowel pin was scored from chips and misalignment; the carbon packing was cracked and broken in four blowers; the exhaust case was assembled so that when the stuffing box cover was tightened, before delivery to Mare Island, the exhaust case was broken; the bucket wheel was out of static and dynamic balance; the fan was in static and dynamic unbalance; the casing contained dirt, chips, sand, and lint; pump case, upper, and pump case, lower, were out of line with pump shaft, upper; the oil tank had not been properly cleaned, having sand clinging to the inner surface, and containing dirt, chips, and lint; the screen for pump case was clogged with dirt, chips, and lint; bearing liner holder was filed out of true about 1/64 of an inch; a surface inspection of the other seven blowers disclosed that they were inherently defective.

Thereupon all of the other seven blowers were disassembled and each displayed, in varying degree, the above defects, except that in only one of the eight blowers was the exhaust case broken. These defects were inherent, and the blowers, as delivered to Mare Island Navy Yard, were not suitable for the purpose for which they were intended.

Machinist Wolff, on August 28, 1930, acting under authority of the Engineering Bureau of the Navy, began correcting certain defects. On September 23, 1930, shop tests were completed on the blowers which had been overhauled and corrected. As a result of said shop tests, the eight blowers appeared to be satisfactory. During October 1930, all eight blowers were installed in the Cruiser *Chicago* and have since operated satisfactorily.

The cost of making the necessary repairs at the Mare Island Navy Yard, which was charged to plaintiff, was

$4,541.97. This sum was reasonable for the work performed. These repairs were necessary in order to make the blowers conform to the provisions of the contract.

7. The total contract price was $75,640. Defendant has paid plaintiff $69,016.45. The balance of $6,623.55 was deducted by the defendant from the total contract price in the final payment under the contract by defendant—this amount being the total of the two sums of $2,081.58 (finding 5) and $4,541.97 (finding 6), representing the reasonable cost of the necessary work performed by defendant on the blowers at the Puget Sound and Mare Island Navy Yards.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The sixteen forced draft blowers involved in this proceeding were designed and manufactured under a contract between the plaintiff and the defendant for use on the cruisers *Chicago* and *Louisville*. Plaintiff's plant was located at Boston, Massachusetts, and the points of delivery and final inspection and acceptance were the Navy Yards of Mare Island, California, and Puget Sound, state of Washington. The draft blowers were, under the contract, to be delivered March 1, 1929, but they were not completed and delivered until 1930. Eight of the blowers were delivered on June 15, seven on August 9, and one on September 15, 1930. Upon receipt of the blowers on the west coast, they were inspected and tested for defects and accuracy of operation. At the time of manufacture of these blowers, plaintiff did not have at its plant the proper equipment for testing the blower units for balance. During the process of manufacture plaintiff experienced considerable difficulty in manufacturing bearings of the metal specified so that the bearings would not overheat or become scored. Naval inspectors, with headquarters at the Boston Navy Yard, were assigned to inspection duty at plaintiff's plant to inspect the manufacture and operation tests of these blowers. The inspection of the completed blowers for balance at plaintiff's plant could only be made by the inspector by placing his hand upon the blower while it was being operated and, after being

so operated, the inspector made the usual examination to determine whether any of the bearings became excessively heated during such operating tests. The local government inspector, upon the tests made for him at plaintiff's plant, concluded that the blowers were satisfactory and did not unduly vibrate or overheat. But, after the blowers were assembled and operated at plaintiff's plant for the purpose of final inspection and test by the local inspector, such inspector made no examination of the blowers for the purpose of determining the condition of the oil lines or bearings after such test, and none of the parts of the blowers was opened or disassembled for inspection to determine the results of such test. The local inspector assigned to plaintiff's plant approved the blowers for shipment to the Navy Yards at Mare Island and Puget Sound.

Upon arrival at destination the blowers were given a steam test and also tested for balance, as was customary, and were otherwise finally inspected as to material and workmanship. The fans of all blower units when properly tested were found to be unduly out of balance. It was also found that the oiling system was clogged with foreign matter; that some bearings were badly scored and became overheated; that some of the shafts were misaligned and that there were some items of inadequate machine work. Upon finding these conditions, the naval officers in charge at the Navy Yards, pursuant to authority and direction of the Bureau of Engineering of the Navy Department, had the defects corrected by the employees, and with machinery, equipment, and material at the Navy Yards after plaintiff had been duly notified and advised of the conditions found to exist. The response of plaintiff to this advice is contained in plaintiff's letter to the inspector of naval material at the Boston Navy Yard, set forth in finding 5. The conditions mentioned were corrected by the defendant and the reasonable cost of doing so was deducted from the total contract price when final payment was made. This was due to the fact that plaintiff did not have at its plant adequate equipment for properly testing the blowers for balance and for bringing them into proper balance; the fact that the blowers were not delivered until more than a year after the contract delivery date,

and were badly needed for installation on the cruisers in which they were to be used in order that the construction of the cruisers might be completed; that the defects discovered, and necessary to be remedied, could be corrected more promptly and at less expense to plaintiff than could be accomplished by rejecting the blowers because not conforming to the provisions of the contract and specifications as to workmanship and material. Plaintiff was paid $69,016.45, which was the contract price of $75,640 less $6,623.55, the amount which it was necessary for the defendant to expend to correct the difficulties mentioned.

In these circumstances we are of opinion that there was no unwarranted deviation from the terms of the contract and specifications by the defendant in remedying and correcting the defects found to exist in the blowers upon delivery at destination. Upon being advised of the condition, plaintiff did not offer to correct the trouble and put the blowers in an acceptable condition as required by the contract and specifications. Plaintiff was already more than a year late in its deliveries and was not entitled to insist upon further delay. Plaintiff now contends that under the terms of the contract the defendant was only permitted to reject the blowers, if, upon final inspection at destination, they were found not to be acceptable or in accordance with the terms of the contract and specifications, and that it had no authority under the contract or specifications to disassemble the blowers and make repairs or changes therein. No mechanical changes were made and charged to plaintiff. The contract did not expressly provide that defendant perform the work necessary to correct the defects mentioned, and, while changes in a manufactured article may not arbitrarily be made by the defendant and charged to the contractor's account, we think, in the circumstances, it had the right to remedy the conditions and defects in question since the plaintiff was not properly equipped to test and correct the machines for balance and did not offer to remedy the other conditions. The contract did not contemplate that the blowers would be delivered in the condition in which they were received. The plaintiff has submitted no proof to show that it has sustained any damage

by reason of the action of the defendant or that the work performed upon the blowers by the defendant, and necessary to be performed in order that they might conform to the requirements of the contract and specifications, was greater than the cost for which plaintiff could have corrected such conditions if the blowers had been rejected.

We are of opinion that plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

SIDNEY F. ABRAHMS v. THE UNITED STATES

[No. 43520. Decided December 4, 1939]

On the Proofs

Pay and allowances; quarters of Army officer on duty with Civilian Conservation Corps.—Plaintiff, a second lieutenant, Cavalry Reserve, U. S. A., on active duty with Civilian Conservation Corps, was assigned tent quarters for his use and occupancy, which, it is held, were not adequate under the Statutes and Army Regulations.

Same.—Plaintiff having been assigned quarters in a standard Civilian Conservation Corps building common in that service, and constructed for the use and occupancy of officers assigned to that service, it is held that such quarters were adequate.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *Messrs. King & King* were on the brief.

Mr. Louis R. Mehlinger, with whom was the *Assistant Attorney General*, for the defendant.

Plaintiff, a second lieutenant on active duty with the Civilian Conservation Corps, seeks to recover $321.33 rental allowance in lieu of adequate government quarters, which it is alleged were not furnished for the periods June 6 to October 16, 1933, and November 1, 1933, to March 31, 1934.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff, at all times hereinafter mentioned, was a second lieutenant in the Cavalry Reserve, United States Army, serving on active duty with the Civilian Conservation Corps.

On May 15, 1933, Special Orders No. 113 were issued by Headquarters Second Corps Area, Governors Island, New York, which orders directed plaintiff to report at Camp Dix, New Jersey, for assignment to active duty with the Civilian Conservation Corps.

2. Plaintiff reported for duty at Camp Dix, New Jersey, as ordered, and served on active duty there until June 3, 1933, when he departed from the station under orders assigning him to duty with Civilian Conservation Corps Company No. 1262, at Camp Paddy Flat, Donnelly, Idaho.

Plaintiff remained at Camp Paddy Flat, Donnelly, Idaho, until October 16, 1933, when he departed from the station under orders assigning him to duty with Civilian Conservation Corps Company No. 1262, at Arthur, Tennessee.

Plaintiff was serving on active duty at Arthur, Tennessee, on March 31, 1934, the date upon which his claim terminates.

3. During the period from May 19, 1933, to June 3, 1933, while plaintiff was stationed at Camp Dix, New Jersey, he was assigned to and occupied quarters consisting of one room in the St. George Club on the Post, which quarters were deemed adequate for an officer of his grade by competent military authority.

During the period from June 6, 1933, to October 16, 1933, while plaintiff was stationed at Camp Paddy Flat, Donnelly, Idaho, he was furnished tent quarters, the type and condition of which are not known.

From October 20, 1933, to January 3, 1934, while stationed at Arthur, Tennessee, plaintiff was assigned to and occupied, as quarters, a canvas tent, the size of which is not shown.

4. From January 3, 1934, to March 31, 1934, while stationed at Arthur, Tennessee, plaintiff was furnished and occupied exclusively, as quarters, one unheated room, approximately 10 by 10 feet, furnished with a metal cot, in a standard frame building of the type of construction for regular use

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and occupancy of officers assigned to the C. C. C. This building contained 12 rooms, about 10 by 10 feet in size, and one large room in the center. He shared with other officers the use of a living room which was heated, and the use of toilet facilities consisting of a shower bath and an outside latrine.

5. On March 6, 1934, the Secretary of War determined, and on April 12, 1934, Army Regulations 30½ were issued providing that shelter furnished for personal use to commissioned and warrant officers at Civilian Conservation Corps work camps, and consisting of tents or space in temporary wooden buildings or shacks, does not constitute adequate quarters as contemplated by law, and that if such shelter only has been or is available, and has been or is being furnished at any work camp, then there are not and at no time have been any public quarters available for such commissioned and warrant officers at said work camp.

6. If plaintiff is entitled to the rental allowance of an officer of his grade and rank without dependents for the periods from June 6, 1933, to October 16, 1933, and from November 1, 1933, to March 31, 1934, there is due him the sum of $321.33.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The plaintiff, a second lieutenant, seeks to recover rental allowance provided for an officer of his rank without dependents under the act of March 4, 1915, 38 Stat. 1062, Section 2 of the Act of May 31, 1924, 43 Stat. 250, amending the Act of June 10, 1922, 42 Stat. 628, and Army Regulations 30½ of April 12, 1934. Such rental allowances are claimed for the periods from June 6 to October 16, 1933, and from November 1, 1933, to March 31, 1934. During these periods plaintiff was on active duty with the Civilian Conservation Corps and from June 6, 1933, to January 3, 1934, the only quarters available and assigned to plaintiff for his use and occupancy consisted of tent quarters. These quarters were not adequate under the statutes and Army Regulations above mentioned, and the defendant does not now question plaintiff's right to recover the rental allowance at the statutory rate of $34 a month, totaling $217.60, for the

two periods of the claim, June 6 to October 16, 1933, and November 1, 1933, to January 3, 1934. See *O'Mohundro* v. *United States*, 84 C. Cls. 362, and *Lee* v. *United States*, 84 C. Cls. 629.

For the remainder of the period involved, to wit, January 3 to March 31, 1934, while plaintiff was stationed at Arthur, Tenn., he was furnished and occupied the quarters described in finding 4. Plaintiff contends that these were not adequate quarters within the meaning of the statutes and Army Regulations 30½ on the ground that this regulation provides that "shelter furnished for personal use to commissioned and warrant officers at Civilian Conservation Corps camps, and consisting of tents or space in temporary buildings or shacks, does not constitute adequate quarters as contemplated by law." This regulation further provides that "Hereafter, commanding officers of Civilian Conservation Corps work camps, who * * * are charged with the assignment and termination of assignment of quarters, will be guided in their determination as to availability of public quarters by the foregoing decision of the Secretary of War."

The building in which plaintiff was furnished and occupied quarters was a standard Civilian Conservation Corps building common in that service, and it was constructed for the regular use and occupancy of officer personnel of the Civilian Conservation Corps. While the building was of wood construction and might be regarded as being in a sense temporary, we think this does not entitle plaintiff to the payment of the money allowance in lieu of quarters. The building was constructed and provided by the government for such purpose. The regulation upon which plaintiff relies provides merely that *shelter* consisting of tents or space in temporary buildings or shacks shall not be regarded as adequate quarters. The two rooms furnished plaintiff in the standard Civilian Conservation Corps building in question cannot be regarded as only "shelter * * * consisting of space in temporary buildings." See *Coleman* v. *United States*, 86 C. Cls. 752. We think it is clear that Army Regulations 30½ cannot be interpreted as providing that quarters furnished and occupied in a standard building constructed for Civilian Conservation Corps use are not public quarters

available for such officers so as to entitle them to payment of the money allowance in lieu of quarters.

Plaintiff is entitled to recover the money allowance in lieu of quarters for the period November 1, 1933, to January 3, 1934. Judgment will therefore be entered in favor of plaintiff for $217.60. It is so ordered.

Williams, *Judge;* Green, *Judge;* and Whaley, *Chief Justice*, concur.

Whitaker, *Judge*, took no part in the decision of this case.

A. P. WILLIAMS IRON & BRONZE COMPANY, INC., v. THE UNITED STATES

[No. 43908. Decided December 4, 1939]

On the Proofs

Government contract; additional material furnished.—Plaintiff, under a contract with the Treasury Department, Procurement Division, agreed to furnish and deliver, and did furnish and deliver, approximately 30 tons of structural steel to be used in the construction of a portable grandstand. After such delivery, a question arose as to 6,500 angles required for completing the structure. Plaintiff, though contending the contract did not require it to furnish these angles, nevertheless agreed to furnish said angles in order that the grandstand might be used for a parade, with the understanding plaintiff would later present a claim for payment.

Held:

The contract required the plaintiff to furnish only the 30 tons of structural steel required for 300 bents, as shown on the drawing, but not the 6,500 angles, also shown on drawing.

The Reporter's statement of the case:

Mr. Prentice E. Edrington for the plaintiff.

Mr. H. A. Julicher, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized under the laws of the State of New York with its office at 430 East 102nd Street, New York City.

2. On April 10, 1936, plaintiff submitted to the New York State Procurement Division of the United States Treasury Department a bid to deliver certain material to the W. P. A. Machine Shop (Job 908), 181st Street and Webster Avenue, Bronx, New York, which is plaintiff's exhibit I.

On April 17, 1936, the Procurement Division signed a purchase order based on plaintiff's bid for certain material, described as follows:

> Furnish and deliver the following:
>
> Approximately 30 tons of structural steel for portable grandstand to compose three hundred bents as shown on drawing. These bents and fixtures shall be sufficient to erect 275 seat spans and 24 step spans.
>
> The vendor shall do all cutting, chipping, blocking, bending, punching, drilling, and welding in accordance with plans.
>
> The vendor shall paint all members with one shop coat of red lead and linseed oil, and mark same as directed on sketch.
>
> The vendor will be required to do no riveting or assembling.
>
> The vendor shall complete and deliver first all members that are to be riveted as shown on the drawings.
>
> Material and workmanship to be first class in every respect and equal to the best practice.

The purchase order is plaintiff's exhibit B and the drawing referred to is plaintiff's exhibit D. The material was to be furnished within a week and the lump sum to be paid to plaintiff was $3,000. All exhibits referred to are made a part of this report by reference.

3. The plaintiff fabricated the structural steel for the portable grandstand and delivered it on time. The drawing shows what material was to go into the portable grandstand and also how the knocked down material supplied by plaintiff and others was to be assembled. On the center right portion of the drawing are listed three groups of materials to go into the portable grandstand. The first of these is headed "Bill of Material for One Bent." Plaintiff furnished all the material under this heading to compose 300 bents except the last six items thereof which are not properly classed as structural steel, and plaintiff was not requested or required to furnish any of these six items.

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4. A day or two after plaintiff had delivered approximately 30 tons of structural steel for the portable grandstand to compose 300 bents, someone from the W. P. A. Machine Shop telephoned plaintiff inquiring about angles which were listed on the drawing under the heading, "Material for 3 Seat Spans of 4′-6″ Each," and also under the heading "Material for One Step Span," designated under these headings on the drawing "ad," "aer," and "ael," and listed with lumber, bolts, and other material for the seat and step spans. Plaintiff claimed that its contract only called for structural steel material listed under the heading "Bill of Material for One Bent" and plaintiff refused to furnish the angles. Thereupon the New York State Procurement Division of the United States Treasury Department made demand upon plaintiff to supply the angles, and again plaintiff refused on the ground that the angles were not a part of its contract. The plaintiff was told that the grandstand was urgently needed for a parade that was to take place in a few days; and the plaintiff, under the circumstances, agreed to furnish the angles under protest with the understanding that it would present a claim for payment of the angles as an extra beyond contract requirements.

5. Plaintiff did furnish 6,500 angles 2″ x 2″ x 3/16″ each 3½″ long, which were designated "ad," "aer," and "ael," and listed on the drawing under the headings of "Material for 3 Seat Spans" and "Material for One Step Span," and were not listed under the heading of "Bill of Material for One Bent," and delivered them to the defendant. Defendant accepted them and used them in the erection of the portable grandstand. The reasonable value of the angles furnished by plaintiff was $.10 apiece, or a total of $650.

6. On May 5, 1936, plaintiff addressed a letter to the defendant and enclosed therewith its bill for the 6,500 angles in the amount of $650. Plaintiff received no answer.

On August 25, 1936, plaintiff addressed another letter to the defendant asking payment for the angles in the amount of $650. No answer was received to this letter.

On September 12, 1936, plaintiff addressed a third letter to the defendant again asking for payment of the 6,500 angles in the amount of $650. No answer was received by plaintiff from the defendant.

The court decided that the plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

On April 17, 1936, plaintiff entered into a contract with the United States Treasury Department, New York State Procurement Division, wherein plaintiff agreed to furnish and deliver approximately 30 tons of structural steel to be used in the construction of a portable grandstand, to be delivered within ten days to the W. P. A. Machine Shops, Bronx, New York, all in accordance with certain drawings made a part of the contract.

After the plaintiff had delivered approximately 30 tons of structural steel under the contract, and as it thought had completed the contract, a question arose between the plaintiff and the defendant as to 6,500 angles required for the completed structure, which plaintiff up to that time had not furnished. Plaintiff contended that the contract did not require it to furnish these angles, while the defendant contended that it did, and made demand upon the plaintiff to supply them, but plaintiff refused to do so. Upon the defendant's insistence, however, that the grandstand was urgently needed for a parade that was to take place within a few days, plaintiff under protest agreed to furnish the angles with the understanding it would present a claim for payment of the angles as an extra beyond the contract requirements. Plaintiff then proceeded to fabricate the 6,500 angles in question and delivered them to the defendant.

The angles were used to keep the seat boards and the step boards in place. They were shown on the drawings and constituted necessary parts of the completed structure. The question for decision is whether or not plaintiff was required to supply them under its contract.

Plaintiff under the contract was required to furnish and deliver the following:

> Approximately 30 tons of structural steel for portable grandstand to compose three hundred bents as shown on drawing.

The drawing lists the material going into the completed grandstand structure and also shows how the knocked-

down material supplied by plaintiff and others was to be assembled. Materials are listed on the drawing in three groups. The first group is headed "Bill of Material for One Bent," another is headed "Material for 3 Seat Spans of 4′–6″ Each," and the third being headed "Material for One Step Span." The angles here involved are listed on the drawing under the headings "Material for 3 Seat Spans of 4′–6″ Each" and "Material for One Step Span," and are not shown under the heading "Bill of Material for One Bent."

Plaintiff in its initial delivery to the defendant furnished the structural steel required for 300 bents as shown on the drawing. That is all the contract required it to furnish. Therefore the 6,500 angles which the defendant required it to furnish under an erroneous construction of the contract were extras. The defendant having received and used the angles for its benefit is therefore obligated to pay plaintiff their reasonable value. *Davis* v. *United States*, 82 C. Cls. 334; *Schmoll* v. *United States*, 86 C. Cls. 632.

The reasonable value of the angles is shown to be 10 cents apiece, or $650. The plaintiff is entitled to recover and is hereby awarded judgment against the United States for the sum of $650. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

JOHN F. ROBINSON v. THE UNITED STATES

[No. 43981. Decided December 4, 1939]

On the Proofs

***Pay and allowances; Acting Chaplain in U. S. Navy; dependent mother.*—Where plaintiff's father is unemployed, except for occasional W. P. A. work, and is in ill health, and plaintiff's mother is unemployed and dependent, it is held that plaintiff is entitled to recover for rental and subsistence allowance.**

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *King & King* were on the brief.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. On October 29, 1936, John F. Robinson, plaintiff, accepted an appointment as Acting Chaplain in the United States Navy, with the rank of lieutenant, junior grade. Since October 29, 1936, he has served on active duty under that appointment.

2. John M. Robinson, plaintiff's father, was 69 years of age in 1938. He was employed formerly as a bricklayer or mason, but has been unable to obtain regular work since 1933 on account of his advanced age and physical condition. With the exception of a few small jobs, from which he earned about $200.00 or $300.00 a year, he held no regular employment during the period from October 29, 1936, to about the middle of July 1938. In July 1938 he obtained temporary employment with the Works Progress Administration on an airport project at North Beach, Long Island, New York. He is permitted to work not more than 6 days per month on the airport project, and usually is prevented from working the full 6 days on account of inclement weather conditions. His earnings average about $70.00 a month, out of which he pays $1.05 a month as union dues, plus a picket charge of 30 cents a month, and he uses 35 cents a day to travel to and from his work, his average net monthly earnings being about $67.00. Mr. Robinson, though classified as a bricklayer on the airport project, actually works at a "cutting bench," where he trims porcelain tiles. Such work is not nearly as tiring as is the usual and customary work of a bricklayer, all the work on that project being far easier than similar work for a private contractor.

3. Plaintiff's father has suffered from a sliding inguinal hernia, or rupture, for a number of years. This condition

renders it dangerous for him to engage in an occupation such as bricklaying, even though the hernia is supported by a truss, for there is always danger of the hernia "slipping," which would result in strangulation of the hernia and would probably require an immediate surgical operation. His physician is of the opinion that, in addition to his hernia, Mr. Robinson is probably suffering from an angina condition of the heart, and that on account of his age and suspected heart ailment he is a poor surgical risk. Even before he suspected Mr. Robinson's heart trouble, he had advised him that it was dangerous for him to work and that he should not attempt to do so. This warning he has repeated to Mr. Robinson since he started work on the airport project.

4. Plaintiff's mother, Catherine Robinson, was 67 years of age in 1938, and is unemployed except for her duties as a housewife. Since 1932 she and her husband have lived in a three-room apartment located at 454 Washington Avenue, New York City. Their joint average monthly household living expenses range from $86.50 to $97.50, and consist of the following items: Food, $30.00 to $40.00; rent, $38.00; gas and electricity, $5.00 to $6.00; telephone, $3.50; premiums on Mr. Robinson's life insurance (payable to Mrs. Robinson on his death), $10.00. In addition to her pro rata share of the joint household expenses Mrs. Robinson spends about $5.00 a month on clothes and contributes about $5.00 a month to the church, making the total of her average monthly living expenses about $55.00.

5. Neither of plaintiff's parents owns any income-producing real or personal property. The only real property owned by them is a one-sixth interest in a frame building located at Simmons Hassock, Long Island, New York. This building was formerly the clubhouse of the Nassau Yacht Club, which plaintiff's father joined about 22 years ago. The club dissolved during the World War and plaintiff's father, with five other individuals, secured title to the clubhouse by discharging an indebtedness of from $1,500.00 to $1,800.00 secured against the property. No income has been realized from the property and the only use made of it by

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its owners is to spend short vacations there with their respective families. No expense is incurred on account of the ownership of this property other than a payment of about $5.00 a year by each of the owners as their pro rata share of the ground rent and water taxes on the property.

6. Prior to plaintiff's acceptance of his appointment as a Chaplain in the Navy he was employed as a parish priest and received a salary of $75.00 a month, in addition to his room and board. While so employed, he contributed from $40.00 to $50.00 each month to his parents.

Since October 29, 1936, plaintiff has contributed $100.00 each month to his mother for the support of herself and his father. All his contributions since January 1937 have been made by allotment to his mother.

7. During the period from December 23, 1936, to June 27, 1937, plaintiff was stationed at Quantico, Virginia, and was assigned to and occupied quarters which, while not occupied by his parents, were deemed adequate by competent superior authority for the occupancy of an officer of his grade and rank with dependents.

8. Computation by the General Accounting Office shows the amount due an officer of plaintiff's rank for rental and subsistence allowances on account of a dependent mother for the periods from October 29, 1936, to December 22, 1936, and from June 28, 1937, to March 31, 1938, and for increased subsistence allowance on account of a dependent mother for the period from December 23, 1936, to June 27, 1937, to be $822.13.

This claim is a continuing one.

The court decided that the plaintiff was entitled to recover.

OPINION PER CURIAM:

The facts in this case are not in dispute and conclusively show that plaintiff's mother is dependent upon him for her chief support. See *Culver* v. *The United States*, 81 C. Cls. 631, and *Chester V. Freeland* v. *The United States*, 64 C. Cls. 364.

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Entry of judgment will be suspended to await the coming in of a report from the General Accounting Office showing the amount due plaintiff in accordance with this opinion.

In accordance with the above opinion, and upon a report from the General Accounting Office showing the exact amount due, the Court on March 4, 1940, entered judgment for the plaintiff in the sum of $2,397.93.

TWIN CITIES PROPERTIES, INCORPORATED, v. THE UNITED STATES

[No. 44589. Decided December 4, 1939]

On the Proofs

Lease of post-office premises; recovery for remaining period after Government vacated premises.—Plaintiff sues to recover amount alleged to be due as rent for the period from July 1, 1935, to December 31, 1938, inclusive, for certain premises described in a lease for a postal station, dated December 8, 1923; said premises having been vacated by the Government on March 1, 1935, and recovery having been had in a prior action (87 C. Cls. 531) for the period from March 1, 1935, to June 30, 1935; the lease having been held to be valid.

Held:

(1) The defendant is entitled to deduct from the rent due for the period stated the amount plaintiff would have been required, under the lease, to spend for heat, light, power and other services had the defendant continued to occupy the premises during the period of the claim.

(2) The plaintiff was under no legal obligation to the defendant to rerent the building after the defendant surrendered possession.

(3) The lease in question having been entered into under the express authorization of an act of Congress, the obligation of the Government to pay the rent stipulated in the lease was not dependent on an annual appropriation by Congress to pay the rent as it accrued.

Same.—The plaintiff can claim no better position as to the amount which it may recover than that which would have existed if the contract had been performed by both parties.

Same.—Where it is contended that in a prior suit defendant could have, but did not, set up a defense which is now asserted in the instant case, it is held that the defendant is not estopped to raise such defense in the present case.

The Reporter's statement of the case:

Mr. James R. Garfield for the plaintiff. *Mr. Richard H. Wilmer* and *Garfield, Cross, Daoust, Baldwin & Vrooman* were on the briefs.

Mr. J. Robert Anderson, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows upon a stipulation of the facts and the evidence:

1. Twin Cities Properties, Incorporated, plaintiff, is a corporation organized and existing under the laws of the State of Minnesota, having its principal place of business at Clayton, Missouri, and is the owner of certain property in Minneapolis, Minnesota, leased to the defendant pursuant to a lease dated December 8, 1923, for a period of 20 years, at an annual rental of $71,900.

2. Claiming the lease was invalid and claiming the right to cancel same, the defendant, on or about March 6, 1935, vacated the leased premises and has not occupied the same since that date.

3. The lease dated December 8, 1923, was determined by this court to be a valid, enforceable, and subsisting lease between the plaintiff and defendant in cause No. 43088, in an action entitled *Twin Cities Properties, Incorporated, Clayton, Missouri*, v. *United States*, in which cause the plaintiff sued for the full amount of rent due under said lease for the months of March, April, May, and June 1935, in the amount of $24,166.39, at the rate of $71,900 per annum, as fixed in the lease. The court, on November 14, 1938, 87 C. Cls. 531, decided that plaintiff was entitled to recover and entered judgment in favor of the plaintiff for the entire amount claimed. No petition for certiorari was filed with the Supreme Court of the United States in said cause and the full amount of the judgment recovered has been paid by the defendant to the plaintiff.

4. Had the defendant continued to occupy the premises involved as a parcel-post station during the period for which rent is claimed in the present action the plaintiff would have been compelled to make necessary expenditures for heat, light and power, water, wages, sundry building

operating expenses, repairs and maintenance, elevator maintenance, and building management, the sum of $34,894.44, less the amount of $6,070.40, the amount which plaintiff actually expended for such purposes covering the period involved. The question whether, in fixing the amount which plaintiff might recover under the contract, the gross annual rental of $71,900 stated in the lease should be reduced by any amount on account of plaintiff being relieved of the expense of maintaining the building, as above stated, was not presented or argued by the defendant, or considered or decided in the prior case.

5. In cause No. 43088, the former suit, defendant did not set up as a defense for purposes of reducing the amount of rent sued for or for any other purpose any defense based upon the fact that during the months for which rent was sued for in said cause the plaintiff did not furnish heat, light, and power, water, nor expend any sums for wages, building operation, repairs and maintenance, elevator maintenance, or building management, although such defense was equally available to the defendant in legal principle in cause No. 43088.

6. At no time since the defendant vacated the leased premises on or about March 6, 1935, has it demanded or requested the plaintiff to furnish any of the aforesaid facilities nor has the defendant offered any evidence in this cause showing that at any time during the period of July 1, 1935, to December 31, 1938, or since March 6, 1935, it complained to the plaintiff that the facilities actually being furnished were not satisfactory to it.

7. When the defendant vacated the premises on or about March 6, 1935, it moved the parcel-post functions theretofore conducted on the premises of the plaintiff to a new post-office building that theretofore had been erected and completed by the defendant in Minneapolis, Minnesota.

8. No evidence has been introduced to show that the defendant, if it had conceded the legality and enforcibility of the lease dated December 8, 1923, would have continued to occupy said parcel-post station during the three and one-half year period above mentioned or any part thereof or would have requested the plaintiff to furnish any of these facilities during the period or any part thereof.

9. The rent sued for herein in the amount of $251,650 has not been paid to the plaintiff nor has any part thereof been paid to the plaintiff, and, although the plaintiff has made demand upon the defendant to pay said rent, and each installment thereof, the defendant has refused to pay the same or any part thereof.

The court decided that the plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover the sum of $251,650 as rent for the period from July 1, 1935, to December 31, 1938, inclusive, for certain premises described in a lease for a postal station, dated December 8, 1923. This lease superseded and cancelled a prior lease for the same premises dated October 24, 1922, running for a period of twenty years, which contained a ninety-day cancellation clause providing for the termination of the lease whenever the postal station could be moved into a Government building. The superseding lease of December 8, 1923, omitted the cancellation clause of the prior lease, otherwise its provisions were precisely the same.

The defendant, claiming that the superseding lease was void for want of consideration, and that its occupancy of the premises was under the prior lease of October 24, 1922, vacated the premises of plaintiff on March 1, 1935, and moved the parcel-post functions theretofore conducted there to a new post-office building erected by the defendant. The defendant has not occupied the premises of plaintiff since that date and has refused to recognize any right of plaintiff to receive the rent stipulated in the lease.

On July 12, 1935, plaintiff instituted suit in this court to recover $24,166.39, the rent due, under the terms of the lease, for the period March 1, 1935, to June 30, 1935. The court held that the lease was a valid, subsisting, and enforceable one and entered judgment for the plaintiff for the entire amount sought to be recovered. *Twin Cities Properties, Inc.* v. *United States*, 87 C. Cls. 531. The defendant made no motion for a new trial, and no petition for certiorari was filed with the Supreme Court of the United States. The judgment obtained was subsequently paid in full.

Opinion of the Court

The defendant does not undertake in this case to reassert the invalidity of the lease sued upon but in its brief and argument raises three points against the right of plaintiff to recover the amount claimed:

(1) That the defendant is entitled to deduct from the rent due for the period the sum of $34,894.44, the amount plaintiff would have been required under the lease to spend for heat, light, power, wages, building operations, repairs, water, maintenance, elevator, and other services, had the defendant continued to occupy the premises as a parcel-post station during the period of the claim. It is urged that the furnishing of these services constituted in part the consideration for the stipulated rental provided in the lease, and that since plaintiff by reason of the nonoccupancy of the premises as a parcel-post station for the period covered by the claim was relieved of these expenditures which it would otherwise have incurred, the defendant, as a matter of right and law, is entitled to deduct the same from the rental accruing for such period. The defendant says in the brief:

> * * * plaintiff is entitled to nothing more than it would have realized as net income from the premises, had the defendant actually occupied the same.

The amount which plaintiff can recover under the lease must be determined in accordance with the provisions of the contract between the parties, and we are of opinion that under the principle of law applicable to contracts containing provisions such as the lease involved in this case, the plaintiff can claim no better position as to the amount which it may recover than that which would have existed if the contract had been performed by both parties. The obligation of the defendant to pay a gross annual rental of $71,900 was dependent upon the performance by plaintiff of certain stipulated conditions, under which the plaintiff promised and became obligated to bear the expense necessary to furnish heat, light, power, wages, building supplies, repairs, water, maintenance of elevator, and other services during the term of the lease. Upon the breach of the contract by the defendant plaintiff became entitled to recover

thereon, but the amount which he can recover under the contract cannot exceed the amount of compensation to which he would have been entitled, or would have received, had the contract been fully performed by both parties. In other words, the plaintiff can recover only such amount as will put it in as good a position as it would have been had the defendant kept its promises. By the defendant's nonperformance, the plaintiff was saved from the labor or expense of performing on its part and, in order correctly to settle the rights of both parties under the contract, the cost or saving to the plaintiff, by being relieved of the expense of performance of its promises contemplated by the contract, which obviously entered into the stipulated annual rental, should be deducted from the value to it of the performance which the defendant should have made. This rule applies in the case of a bilateral contract with dependent promises which is partly unperformed by plaintiff, and the value of the performance promised by the plaintiff, and still unperformed because of the breach, should be deducted from the value of the performance still due from the defendant. Vol III, Williston on Contracts, sections 1338, 1339, 1349. This rule was applied by the court in *Benjamin* v. *Hillard et al.*, 23 How. 149, in which the court, quoting from *Alder* v. *Keightly*, 15 M. and W. 117, said, "* * * here is a clear rule: that the amount that would have been received, if the contract had been kept, is the measure of damages if the contract is broken." See, also, *United States* v. *Speed*, 8 Wall. 77, 84, 85.

The facts show (finding 4) that if the defendant had performed its promises made in the contract, the plaintiff, in the performance of its promises therein, would have expended for the purposes mentioned the sum of $34,894.44 during the period from July 1, 1935, to December 31, 1938, inclusive, for which it seeks to recover rental from the defendant in this action. However, because of the defendant's failure to perform, it was only necessary for the plaintiff to expend the amount of $6,070.40 for the purpose of properly maintaining and caring for the premises covered by the lease. The amount so expended should be deducted from the $34,894.44, which plaintiff would otherwise have

been required to expend, leaving the sum of $28,824.04 as the sum by which the total gross rental of $251,650 claimed in this case should be reduced in fixing the amount of the judgment to which plaintiff is entitled under the contract.

Plaintiff contends that since in the prior suit (87 Ct. Cls. 531) it sued for rent under the same contract for the period March 1 to June 30, 1935, inclusive, the defendant could have in that proceeding asserted the defense that the cost of performance on plaintiff's part, if the lease had been kept, should be deducted from the amount recoverable under the contract, and that the defendant is estopped to raise such defense in the present case by reason of the principle that a party cannot split up defenses and present them in piecemeal in successive suits growing out of the same transaction. We are of the opinion that plaintiff's position cannot be sustained in the circumstances of this case. The cause of action, to wit, the amount of rent due under the contract for the period July 1, 1935, to December 31, 1938, is not the same subject matter as was involved in the prior suit. While the claim is for rent due under the lease, the validity and legality of which were involved and adjudicated in the prior case, recovery is here sought for a period subsequent to the period for which an amount was recovered in the prior suit. The case of *The Washington, Alexandria, and Georgetown Steam Packet Company* v. *Frederick E. Sickles et al.*, 24 How. 333, was a second suit by Sickles and Cook to recover from the Packet Company a sum of money, being a part of the consideration or price for the use of a machine for which the plaintiffs had a patent, and was the complement of a whole, of which the sum demanded in the first suit was the other part. From the facts stated by the court, it appears that in the second suit the plaintiffs produced upon the trial, as the only testimony of the contract between the parties and their right to recover the second instalment, the proceedings of the first suit mentioned in the declaration, and insisted that these proceedings operated as an estoppel upon the defendants. In addition, plaintiffs in this second suit submitted proof of the quantity of the fuel that had been used in operating the boat in order to show the amount due and relied upon the

rate as settled to determine their demand, and insisted that the defendants were estopped to prove there was no such contract; or to disprove any one of the averments in the first count of the declaration in the former suit; or to show that no saving of fuel had been effected. The Circuit Court sustained the contentions of plaintiffs and excluded the testimony offered by defendants in the second suit to prove that there was no contract; that no saving of fuel had been effected by the use of plaintiffs' machine; that the so-called experiment was not made pursuant to the contract; that the verdict in the first suit was in fact rendered upon all the testimony and allegations that were submitted to the jury, and was in point of fact rendered upon the issues generally, and not upon the first count of the declaration specially. Upon appeal, the Supreme Court reversed the Circuit Court and held that the defendants were entitled to raise these issues if they had not been decided in the first case and to show by evidence whether the matters then set up as defenses had been presented, considered, and decided in the former suit, and stated, at page 342, that "The essential conditions under which the exception of the *res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause of the demand, and of the parties in the character in which they are litigants. * * * that a judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, must have been made by a court of competent jurisdiction upon the same subject matter, between the same parties for the same purpose." The court sustained the contention of the Packet Company that, conceding the record to be admissible as evidence, in order to render the verdict and judgment in the first suit an estoppel, "it must be shown by the *record*, that the very point which it is sought to estop the party from contesting was distinctly presented by an issue, and expressly found by the jury, * * *."

Subsequently, in 1876, the court decided the case of *Cromwell* v. *County of Sac*, 94 U. S. 351, which was a suit on four bonds of the county of Sac, in the State of Iowa, each for $1,000, and four coupons for interest, attached to them, each for $100. To defend this action, the defendant,

the county of Sac, relied upon the estoppel of a judgment rendered in favor of the county in a prior action upon certain earlier maturing coupons on the same bonds. The court said, at page 352:

> In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.
>
> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a

> different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.
>
> The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel.

The court further said at pages 354, 355:

> These cases, usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, negative the proposition that the estoppel can extend beyond the point actually litigated and determined. The argument in these cases, that a particular point was necessarily involved in the finding in the original action, proceeded upon the theory that, if not thus involved, the judgment would be inoperative as an estoppel. . . .

And, further, at page 356, the court said:

> It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action.

The rule announced and applied in *Cromwell* v. *County of Sac*, *supra*, was approved and reaffirmed in *Southern Pacific Railroad Co.* v. *United States*, 168 U. S. 1, 48, 50; *Tait* v. *Western Maryland Railway Co.*, 289 U. S. 620, 623.

Upon these authorities we hold that the defendant is not estopped by the decision in the former case to raise the question of the deduction.

(2) The defendant contends that the plaintiff, at most, is only entitled to recover nominal damages herein, as to which the court will not entertain jurisdiction, because of plaintiff's

failure to make a reasonable attempt to relet the premises and thus minimize and reduce the amount of its loss. There is no evidence in the record to show what effort, if any, plaintiff made to relet the premises subsequent to abandonment by the defendant, but it is not a matter of importance whether such effort was made or not made as the plaintiff was under no legal obligation to the defendant to rerent the building after the defendant surrendered possession of it. Plaintiff did not accept defendant's surrender of the property. If plaintiff had accepted it back and rerented it to some other person, a rescission of the lease would have been thereby effected and the defendant wholly released from its obligation. *Haycock* v. *Johnson*, 81 Minn. 49, 83 N. W. 494. This rule is stated in Williston on Contracts, Sec. 1403, where it is said:

> The landlord is under no obligation to relet the premises, however; he may remain inactive and sue the tenant for the rent when it matures.

In 36 Corpus Juris 342, sec. 1153, the rule is stated:

> A landlord is not, on the abandonment of the demised premises by the tenant in violation of his contract, required to relet for the protection of the latter, but may at his election suffer the premises to remain vacant, and recover his rent for the remainder of the term.

The courts, where this question has been directly passed upon, have, with few exceptions, followed the rule laid down by Williston and Corpus Juris, and held that a lessor was under no legal obligations to attempt to rerent premises and could recover the rental agreed upon without taking any steps to lessen the damages. The contention of the defendant therefore cannot be sustained.

(3) As the third and final defense the defendant contends that the plaintiff has not proved, as a condition precedent to recovery, that there was an appropriation by Congress for the rent sued for herein. This contention is based on the provision of the lease reading as follows:

> * * * for, during, and until the full end and term of twenty (20) years then next ensuing, from and after the fifth day of July, A. D. nineteen hundred and twenty-two, provided Congress shall make the necessary

> appropriation therefor from year to year, or authorize the payment of such rental, and subject to termination as hereinafter provided, and the said party of the second part yielding and paying therefor, unto the said party of the first part, its officers, their successors in office, or assigns, from and after the date last above mentioned during the time of occupation by the United States of the said premises under this lease, rent at the annual rate of * * *.

It is contended that under this provision of the lease an annual appropriation to meet the rent as it accrues is a condition precedent to the payment of the rent and that without an appropriation no rent can accrue; that the burden of proof of the existence of the actual appropriation for the payment of the stipulated rent was upon the plaintiff to establish and that the failure of the plaintiff to do so is fatal to any recovery. In making this contention the defendant overlooks the fact that the provision upon which it relies as a condition precedent to plaintiff's right to recover is stated in the alternative, (1) either that Congress shall make the necessary appropriations therefor from year to year, or (2) authorize the payment of such rental. This provision of the lease is a standard provision and follows the provisions of the general statutes which in effect prohibit obligating the Government unless under a specific appropriation or in the alternative where the obligation is authorized by law.

The lease in this case was entered into under express authorization of the act of Congress of April 24, 1920, Title 39, Sec. 11, U. S. C. A., which provides:

> The Postmaster General may, in the disbursement of the appropriation for rent, light, and fuel for first-, second-, and third-class post offices, apply a part thereof to the purpose of leasing premises for the use of post offices of the first, second, and third classes at a reasonable annual rental, to be paid quarterly for a term not exceeding twenty years. (Apr. 24, 1920, c. 161, § 1, 41 Stat. 578.)

The lease in question having been entered into under the express authorization of an act of Congress, the obligation of the Government to pay the rent stipulated in the lease

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became fixed for the period covered by the lease and that obligation is in no way dependent on Congress making annual appropriations to pay the rent as it accrues.

Furthermore the same point now made by the defendant was raised by the defendant by a demurrer in the first suit herein, No. 43088. The demurrer, insofar as this point is concerned, stated the following grounds:

> 1. That the petition fails to allege that the Congress has made the necessary appropriation, or authorized payment of the rent sued for, as provided in the lease * * *. Such appropriation or authorization is a condition precedent to any payment of rent.

The court overruled the demurrer. The defendant is now estopped from raising the same question in this proceeding and having it litigated a second time.

The plaintiff is entitled to recover and is hereby awarded judgment in the sum of $222,825.96. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

WILSON & COMPANY, INC. v. THE UNITED STATES; WILSON & COMPANY, INC., OF KANSAS v. THE UNITED STATES; T. M. SINCLAIR & COMPANY, LTD. v. THE UNITED STATES

[Nos. 44641, 44642, 44643. Decided December 4, 1939]*

On Motions to Dismiss

Processing taxes on exported goods; determination of the Commissioner final; courts without jurisdiction.—The determination of the Commisisoner of Internal Revenue as to claims for refund of processing taxes on goods exported under the Agricultural Adjustment Act, as amended, is held to be final under the provisions of Section 601 (e) of the Revenue Act of 1936, and no court has jurisdiction to review such determination.

Same; explicit language.—Where the language of an act of Congress is explicit, it is not necessary to resort to reports of congressional committees for interpretation of the meaning.

*Certiorari granted, April 22, 1940.

Same; purpose of Congress.—It would be inconsistent with the purpose of Congress in the enactment of section 17 (a) of the Agricultural Adjustment Act and of section 601 of the Revenue Act of 1936 to exclude processors-exporters from the benefits of these sections.

Same.—Congress intended to relieve the processor from the processing tax as to all articles exported in order that Americans might compete with the nationals of other countries in the world market.

Same; draw-backs on exportations.—Where claims for refund of processing tax are based on title IV of the Revenue Act of 1936, section 906 (art. VII), which provides for review by the courts of the Commissioner's action on said claims for refund, has no application; said section 906 being confined to proceedings to recover processing taxes and not to draw-backs on exportations.

Same.—Processors suing to recover back processing taxes which had been paid on exported products were not required to show that they did not pass on the burden of the tax nor that their claims for refund had been filed after enactment of the Revenue Act of 1936.

Same.—The statute providing for review of Commissioner's action on claim for refund is confined to proceedings to recover processing taxes and is not applicable to proceeding to recover draw-backs on exportations.

Same.—Congress had the right to take away the privilege granted under section 17 (a) of the Agricultural Adjustment Act to maintain suit to review action of the Commissioner on claims for refund of taxes on products which had been exported.

Mr. Louis R. Simpson for the plaintiffs.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the briefs.

WHITAKER, *Judge*, delivered the opinion of the court:

These cases are pending on motions to dismiss for want of jurisdiction. The allegations of the petitions are in all essential respects the same. They allege that the plaintiffs exported certain hog products which had been processed by them, and on which they had paid the tax, which tax they sue to recover under section 17 (a) of the Agricultural Adjustment Act (48 Stat. 31, 40). This section provides for the refunding of taxes due and paid upon the exportation of any product upon which a processing tax had been paid.

The defendant insists that this Court is without jurisdiction to grant the relief sought because: first, the petitions do not allege that the plaintiffs bore the burden of the tax and did not pass it on; and, second, because the petitions do not allege that the claims sued on were filed after the enactment of the Revenue Act of 1936 (49 Stat. 1648); and, third, because exclusive jurisdiction is vested in the Circuit Courts of Appeal and the United States Court of Appeals for the District of Columbia to review decisions of the Commissioner of Internal Revenue and of the Board of Review in actions for the recovery of processing taxes, and that these are such actions.

The Government insists, specifically, that plaintiffs' remedy is under Title VII of the Revenue Act of 1936, and not under Title IV. If this position is correct, then this Court is without jurisdiction, because section 906 of Title VII provides for a review of the decision of the Commissioner on claims for the refunding of processing taxes only by a Board of Review, and provides for a review of the decision of the Board only by the Circuit Courts of Appeal and by the United States Court of Appeals for the District of Columbia. It is also provided that claims for refund under this Title must have been filed after the passage of the Revenue Act of 1936, and the petitions in these cases show the claims were filed before that date.

We do not think, however, that plaintiffs' remedy lies under Title VII: first, because section 911 under Title VII expressly provides:

> The provisions of this title shall not apply to any refund authorized under the provisions of sections 15, 16 and 17 [1] of the Agricultural Adjustment Act, as amended and reenacted, or with respect to any articles exported under the provisions of section 317 of the Tariff Act of 1930. * * *

Title VII is the title providing for refunds to processors of the processing taxes paid by them. Section 911 under this Title expressly exempts from its provisions processors who are entitled to a refund under section 17 of the Agricultural

[1] This section allows "drawbacks" on exportations.

Adjustment Act on account of the exportation of the articles processed. Language could hardly be more explicit.

The defendant says that the reports of the House and Senate Committees on the Revenue Act of 1936 show that relief was to be had by processors-exporters only under Title VII. It seems to us that the language of section 911 excluding processors-exporters from the terms of Title VII is too explicit to necessitate or to warrant resort to the Committee Reports. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346.

Secondly, we think it would be inconsistent with the purpose of section 17 (a) of the Agricultural Adjustment Act and of section 601 of the Revenue Act of 1936 to exclude processors-exporters from the benefits of those sections. The purpose of Congress in the enactment of these sections was to enable Americans to compete with the nationals of other countries in the world markets. If subject to this processing tax, they could not do this unless the nationals of other governments were subject to a similar tax. If they were, it permitted the American exporter to undersell them and thus dispose of our surplus farm products, which was something very much to be desired at the time of the passage of these Acts. This being the purpose of Congress, there would be no reason for differentiating between an exporter who was not liable for the processing tax and an exporter who was. The purpose was to enable exporters to sell American goods in the world markets as cheaply as possible. Congress, therefore, would have defeated its own purpose if it had required any exporter to pay the tax, whether that exporter was a processor or not.

This view is given support by the fact that section 17 (b) of the Agricultural Adjustment Act permits the processing of articles for exportation without the payment of any tax thereon, if a bond is given to insure the exportation of the article processed. If exported no tax is due and the bond is cancelled. This makes it all the more clear that Congress intended to relieve the processor from the processing tax as to all articles exported. If this be true, of course, the processor-exporter is entitled to the refund provided for in

section 17 (a) of the Agricultural Adjustment Act and in Title IV of the Revenue Act of 1936.

But the defendant says that section 601 (b) expressly prohibits refunds to processors under section 17 (a), relying upon this language:

> Except for refunds under section 15 (a) of the Agricultural Adjustment Act, as reenacted herein, no refund under this section shall be made to the processor or other person who paid or was liable for the tax with respect to the articles on which the claim is based.

If this sentence means what defendant contends, then a processor is entirely without a remedy, because, as we have seen, section 911 excludes him from the remedy of Title VII. It seems to us that the proper construction of this language, in order that the several sections of the Act might be harmonious, is that Congress therein was referring to processors, as distinguished from exporters, and not to processors who were both processors and exporters. The only purpose of the sentence was to make it plain that processors who are not exporters were not to have the benefit of that section, but were to be confined to the relief provided for processors as such.

This view is in harmony with the decision of the Circuit Court of Appeals for the 7th Circuit in *Cudahy Bros. Co.* v. *LaBudde, et al.*, 92 F. (2nd) 937. This decision was followed by the District Court for the 2nd Circuit in *Neuss, Hesslein & Co., Inc.* v. *United States*, Prentice-Hall Federal Tax Service (1939), Par. 5.286.

If we are correct, then, in saying that plaintiffs are entitled to relief under Title IV, it is not necessary that they show they bore and did not pass on the burden of the tax, nor that the claims for refund were filed after the passage of the Revenue Act of 1936. These provisions apply only to claims under Title VII.

Since the plaintiffs' claims are grounded on Title IV, Section 906 (providing for review of the Commissioner's action on the claim for refund) has no application, since it is confined to proceedings to recover processing taxes and since these are suits to recover drawbacks on exportations.

However, we do not think this court has jurisdiction of proceedings under Title IV by reason of the provisions of section 601 (e) of Title IV of the Revenue Act of 1936, which provides:

> The determination of the Commissioner of Internal Revenue with respect to any refund under this section shall be final and no court shall have jurisdiction to review such determination.

The defendant does not defend on this ground, but since we are clearly of opinion that this deprives us of jurisdiction, the petitions must be dismissed on this ground.

The plaintiffs say their actions are not based on section 601 of the Revenue Act of 1936, but on section 17 (a) of the Agricultural Adjustment Act, which they say was not declared invalid by the Supreme Court in *United States* v. *Butler*, 297 U. S. 1, and that under this Act they were entitled to maintain suit. But Section 17 (a) of the Agricultural Adjustment Act, whether or not declared unconstitutional by the *Butler* case, was reenacted by section 601 of the Revenue Act of 1936, and thus became a part of that section, and subsection (e) thereof says that as to all claims for refund under that section the action of the Commissioner shall be final and that no court shall have jurisdiction to review it. Therefore, whether or not the plaintiffs may have had the right to maintain these suits under section 17 (a) before the passage of the Revenue Act of 1936, this right was taken away from them by section 601 (e) of the Revenue Act of 1936. This, of course, Congress had the right to do. Whether or not it should have done so is not for us to decide. Section 601 of the Revenue Act of 1936 now constitutes the only remedy available to plaintiffs.

It results that plaintiffs' petitions must be dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

THE NEW RIVER COMPANY v. THE UNITED STATES

[No. 44760. Decided December 4, 1939]

On Motion to Dismiss

Income tax; interest on deficiencies and overpayments; effect of waiver by taxpayer.—Where taxpayer had waived its right to interest on overpayment of taxes found to be due upon stipulation in a prior suit, and judgment in said suit had been rendered accordingly, but amount of judgment had been withheld by the Commissioner pending determination of tax deficiencies asserted for subsequent years, and where upon the determination of such deficiencies interest was added thereto in the settlement finally effected, it is held that taxpayer cannot recover for the amount of interest waived, despite the alleged inequity.

Same; interest at same rate.—Congress in the Revenue Act of 1928 provided for the assessment of interest on tax deficiencies and payment of interest on tax overpayments at the same rate.

Same.—Congress intended that interest be computed on a deficiency although a taxpayer had overpaid his taxes in a previous year.

Mr. George S. Fuller for the plaintiff.

Mr. S. E. Blackham, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

WHITAKER, *Judge*, delivered the opinion of the court:

This case is before us on defendant's motion to dismiss. The case made by the petition is substantially as follows:

In 1931 the claimant brought a suit in the United States District Court for the Southern District of West Virginia to recover taxes paid for the years 1918, 1919, 1920, and 1921 in excess of the amount which the plaintiff alleged was due. Subsequently the parties entered into a stipulation, upon the basis of which a judgment was rendered in plaintiff's favor for $110,000. This sum did not include any interest on the overpayment, the plaintiff having waived interest.

This amount was not refunded to the plaintiff because of the fact that the Commissioner of Internal Revenue was asserting against it an additional tax liability for the years 1927 and 1928.

On May 28, 1935, it was finally determined that the plaintiff was due additional taxes for those years in the amount of $65,057.29. To this amount interest was added from the date the taxes were due to the date of the additional assessment, amounting to $26,571.16, making a total assessment of $91,628.45. This amount was offset against the $110,000 overpayment for 1918, plus interest thereon which had accrued since the entry of the judgment on January 7, 1933. This left a balance due the claimant of $30,046.76. However, because at that time the Commissioner was asserting an additional tax liability against the claimant for the years 1929 to 1932, both inclusive, this $30,046.76 was not refunded, but, after the final determination of the plaintiff's tax liability for these years, this amount of $30,046.76 was offset against it. This left no amount due the plaintiff.

The motion to dismiss is based on the grounds: first, that the petition does not state a cause of action; second, that the plaintiff had pending in the District Court for the District of Columbia at the time this suit was filed a suit for mandamus against the Secretary of the Treasury and others to require that the $110,000 overpayment involved in this suit be offset against plaintiff's tax liability for subsequent years in the manner required by law, and that at the time the motion to dismiss was filed this suit was pending in the Supreme Court on petition for certiorari; and, third, that this Court has no jurisdiction of plaintiff's suit.

In our view of the case it is necessary to consider only the first ground.

The defendant insists that the Commissioner acted in strict accordance with Sections 292, 614, and 322 of the Revenue Act of 1928 (45 Stat. 791, 858, 861, 876). This the plaintiff does not deny, but says that Sections 292 and 322 were not intended to apply to a case where there had been a deter-

mination of an overpayment of tax in a prior year at the time of the assessment of a deficiency for a subsequent year and this overpayment had not been refunded.

Plaintiff says specifically that interest should not have been included in the assessment of the deficiencies for the years 1927, 1928, and 1929, and only in part for 1930, because at all times the Commissioner had in hand enough of plaintiff's funds to pay the interest and all of the additional tax liability for 1927, 1928, and 1929, and a portion of the additional tax liability for the year 1930.

It seems to us there is no merit in plaintiff's contention since Congress had provided for the payment of interest on both deficiencies and overpayments, and at the same rate. Section 292 of the Revenue Act of 1928 provides for the assessment of interest on a deficiency at six percent from the date the tax was due to the date of assessment. Section 614 of that Act provides for interest on an overpayment of tax at the rate of six percent from the time of the overpayment to the date of its refund, or credit against some other tax. Had the plaintiff not waived what it was entitled to under Section 614, the present alleged inequity would not have arisen; the credit to plaintiff of interest on the overpayment would have offset the assessment of interest on the deficiency. Interest was not computed on the overpayment from the date thereof only because plaintiff had waived it. If now interest were not computed on the deficiency this would nullify the effect of plaintiff's waiver.

It seems clear to us that Congress intended that interest be computed on a deficiency although a taxpayer had overpaid his taxes in a previous year, because provision was made for interest on both.

This view in no way conflicts with the opinion of the Supreme Court in *American Propeller Company* v. *United States*, 300 U. S. 475, or with any fair inference that can be drawn from it, nor with the other cases cited by plaintiff. In the *American Propeller* case plaintiff's demand against the Government did not bear interest; in this case it did, until plaintiff waived it.

The gist of our decision in *Standard Oil Company* v. *United States*, 78 Ct. Cls. 714, was that the intent of Congress in the enactment of the applicable sections of the Revenue Act of 1926 "was to require a mutual set-off of overpayments and deficiencies and to prevent the allowance of interest to the taxpayer for a period during which he was indebted to the Government." The inference from that decision, of course, is that it was not intended, on the other hand, to allow the Government interest when it was indebted to the taxpayer. But, as we have seen, Congress in the 1928 Act took pains to prevent both situations from arising by allowing interest on both overpayments and deficiencies from the date of the accrual of the liability to the date of its discharge.

For the reasons stated, we are of opinion that defendant's motion to dismiss must be granted and the petition dismissed, and it is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

CHIPPEWA INDIANS OF MINNESOTA v. THE UNITED STATES

[No. H-163. Decided January 8, 1940]

On the Proofs

Indian claims; power of Congress not affected by the civilization act of 1889.—It is held that the enactment of the civilization act of 1889, and the approval of the agreements made thereunder, did not deprive Congress of its lawful plenary power over the Indian tribes and their properties to direct changes in the amount, or amounts, of land to be allotted to the individual Chippewas, and that the changes which were directed by Congress in the subsequent acts of 1891 and 1904, which the Department of the Interior effectuated, were lawful; and plaintiffs were not injured and are not entitled to recover from the United States the value of the lands additionally allotted. *Chippewa Indians* v. *United States*, 88 C. Cls. 1, affirmed 307 U. S. 1, cited.

Reporter's Statement of the Case

Same; action of Secretary of Interior effectual.—Where the President never directed the manner in which the Chippewa Indians of Minnesota should consent to the amendatory act of 1891, it is held that the Secretary of the Interior, acting with reference to a matter appertaining to his especial duty, may be regarded as having spoken and acted for the President in the premises.

Same; consent by acceptance of allotments.—A complete consent to to the amendatory act of 1891 was given by the Chippewa Indians of Minnesota when they, without exception, accepted their allotments thereunder.

The Reporter's statement of the case:

Baldwin, Holmes, Mayall & Reavill for plaintiffs.

Mr. Raymond T. Nagle, with whom was *Mr. Assistant Attorney General Norman M. Littell*, and *Mr. Walter C. Shoup*, for the defendant.

Plaintiffs seek to recover $3,771,588.50 alleged to be the aggregate value of 387,810.52 acres of land and 216,305,000 feet of timber thereon as of the dates when the allotments made to certain Chippewa Indians of Minnesota were approved. The right to recover is based on the ground that such allotments constitute an unlawful disposition by defendant of this land and the timber in violation of the act of February 8, 1887, 24 Stat. 388, hereinafter referred to as the general allotment act and the act of January 14, 1889, 25 Stat. 642, entitled "An Act for the relief and civilization of the Chippewa Indians of Minnesota," hereinafter referred to as the civilization act, and also in violation of certain agreements entered into under and pursuant to the civilization act of 1889.

Defendant contends that plaintiffs are not entitled to recover for the reason that the allotments complained of were regularly and legally made under and pursuant to statutes subsequently enacted by Congress in the exercise of its plenary power over the funds and properties of plaintiffs.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiffs, the Chippewa Indians of Minnesota, constitute a class designated and described in the civilization act of January 14, 1889, and the agreements entered into pursuant

thereto, as "all the Chippewa Indians of Minnesota," and the class authorized by the jurisdictional act to maintain suit, as therein provided.

At the date of and long prior to approval of the civilization act of 1889, the various bands and tribes of Chippewa Indians in Minnesota resided on twelve separate reservations, known as the White Earth, Red Lake, Leech Lake, Cass Lake, Lake Winnibigoshish, White Oak Point, Mille Lac, Fond du Lac, Grand Portage, Bois Forte, Deer Creek, and Vermillion Lake reservations, the Indian title to which, in each instance, was held by the Indians belonging thereon.

2. By written agreements made under the civilization act of 1889, and approved by the President on March 4, 1890, the Indians belonging to and occupying each of the above-mentioned reservations ceded to the United States in trust all their title and interest in and to their several reservations for the purposes and upon the terms set out in that act, except as to the Red Lake and White Earth reservations, as to which, in each instance, a portion was reserved and the remainder ceded for disposition for the benefit of the Indians concerned. See House, Executive, Document #247, 51st Congress, 1st sess. The agreement so negotiated with the tribes and bands of Chippewas occupying and belonging to the White Earth reservation, so far as material here, is as follows:

> We the undersigned, being male adult Indians over eighteen years of age of the tribes and bands of Chippewa Indians occupying and belonging to the White Earth Reservation, in the State of Minnesota, do hereby certify and declare that we have heard read, interpreted, and thoroughly explained to our understanding the act of Congress approved January 14, 1889.
>
> And after such explanation and understanding have consented and agreed to said act, and have accepted and ratified the same, and do hereby accept and consent to and ratify said act, and each and all of the provisions thereof, and do hereby grant, cede, relinquish, and convey to the United States all our right, title, and interest in and to all and so much of said White Earth Reservation as is not embraced in the following described boundaries, to wit:
>
> "Townships 141 and 142, or range 37; townships 141, 142, 143, 144, 145, and 146 of range 38; townships 141,

142, 143, 144, 145, and 146 of range 39; townships 141, 142, 143, 144, 145, and 146 of range 40; townships 141, 142, 143, 144, 145, and 146 of range 41; and townships 141, 142, 143, 144, 145, and 146 of range 42, for the purposes and upon the terms stated in said act, which said lands, embraced within said boundaries, have been reserved by the commissioners appointed under said act and as therein authorized, for the purpose of making and filling the allotments therein provided for; and we do also hereby grant, cede, and relinquish to the United States, for the purposes and upon the terms stated in said act, all our right, title, and interest in and to the lands reserved by us and described in the first article (ending with the words 'to place of beginning') of the treaty with the Chippewas of the Mississippi, proclaimed April 18, 1867 (16 Stat. p. 719), and also to the Executive addition thereto made and described in an Executive order dated October 29, 1873; and we do also hereby cede and relinquish to the United States all our right, title, and interest in and to all and so much of the Red Lake Reservation as is not required and reserved under the provisions of said act, to make and fill the allotments to the Red Lake Indians in quantity and manner as therein provided.

Under this agreement thirty-two townships, comprising 707,356.86 acres, were reserved for allotment to Indians residing on, or to be removed to, that reservation, and four townships, comprising 89,318.21 acres, were ceded; 5,177 Indians received allotments out of the reserved lands on the White Earth Reservation and 3,423 Indians, exclusive of the Red Lake Indians, received allotments out of the ceded lands on the reservations where they were then living at the time the allotments were made to them.

Each of the agreements so negotiated with each of the other tribes and bands of the Chippewa Indians in Minnesota was, so far as material here, substantially in the same form as the agreement set out, or above described.

3. No allotments were made under the civilization act of 1889 until after the approval of the act of February 28, 1891, 26 Stat. 794, amending the general allotment act. The Act of 1891, so far as material here, is as follows:

That section one of the act entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the

protection of the laws of the United States and the Territories over the Indians, and for other purposes," approved February 8, 1887, be, and the same is hereby amended so as to read as follows:

SEC. 1. That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or an Executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation, or any part thereof, of such Indians is advantageous for agricultural or grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed, if necessary, and to allot to each Indian located thereon one-eighth of a section of land: * * * *Provided further*, that where existing agreements or laws provide for allotments in accordance with the provisions of said Act of February 8, 1887, or in quantities substantially as therein provided, allotments may be made in quantity as specified in this act, with the consent of the Indians, expressed in such manner as the President, in his discretion, may require. *And provided further*, That when the lands allotted, or any legal subdivision thereof, are only valuable for grazing purposes, such lands shall be allotted in double quantities.

The Secretary of the Interior, whose duty it was to administer the acts relating to Indian tribes and their properties, and to make such allotments, construed the Act of 1891 as amending the civilization act of 1889 and as controlling quantities of land to be allotted. Allotments were made in accordance with the Act of 1891, and such allotments were accepted by the allottees without exception. No allotments have ever been made on the Red Lake Reservation under either the civilization act or the Act of 1891.

The records do not show that the President ever formally directed or prescribed the manner in which formal consent of the Chippewa Indians of Minnesota should be obtained under the Act of 1891, nor did the Chippewa Indians of Minnesota ever make or execute, as a body or tribe of Indians, a formal consent with reference to allotments as specified in and made under the Act of 1891 in excess of the allotments provided for in the civilization act of 1889.

4. Under the Act of 1891, which amended the acts of 1887 and 1889, allotments of more than 40 acres each were made

to single persons not orphans, under 18 years of age, all of whom were enrolled Chippewa Indians of Minnesota, on the reserved portion of the White Earth Reservation in a total of 88,978.74 acres in excess of the total acreage which the allottees would have received if each had been limited to 40 acres; and on the other reservations (not including Red Lake) in a total of 47,509.14 acres in excess of the total acreage which the allottees would have received if each had been limited to 40 acres. All such allotments were made upon tribal rolls of the several reservations, the last of which was closed on July 21, 1900. All the lands mentioned would have been classified as "agricultural lands."

The act of April 28, 1904, 33 Stat. 539, provides as follows:

> That the President of the United States be, and he is hereby, authorized to allot to each Chippewa Indian now legally residing upon the White Earth Reservation under treaty or laws of the United States, in accordance with the express promise made to them by the commissioners appointed under the Act of Congress entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January 14, 1889, and to those Indians who may remove to said reservation who are entitled to take an allotment under article seven of the treaty of April 18, 1867, between the United States and the Chippewa Indians of the Mississippi, one hundred and sixty acres of land; and said allotments shall be, and the patents issued therefor, in the manner and having the same effect as provided in the general allotment act, "an Act to amend and further extend the benefits of the Act approved February 8, 1887, entitled, 'An act to provide for the allotment of land in severalty to Indians on the various reservations and extend the protection of the commissioners of the United States over the Indians, and for other purposes,' " approved February 28, 1891: *Provided*, That where any allotment of less than one hundred and sixty acres has heretofore been made, the allottee shall be allowed to take an additional allotment, which, together with the land already allotted, shall not exceed one hundred and sixty acres: *And provided further*, That if there is not sufficient land in said White Earth (diminished) Reservation subject to allotment each Indian entitled to allotments under the provisions of this act shall receive a pro rata allotment.

Article 7 of the treaty of April 18, 1867, 16 Stat. 719, referred to in the above-quoted act, is as follows:

> As soon as the location of the reservation set apart by the second article hereof shall have been approximately ascertained, and reported to the office of Indian Affairs, the Secretary of the Interior shall cause the same to be surveyed in conformity to the system of Government surveys, and whenever, after such survey, any Indian, of the bands parties hereto, either male or female, shall have ten acres of land under cultivation, such Indian shall be entitled to receive a certificate, showing him to be entitled to the forty acres of land, according to legal subdivision, containing the said ten acres or the greater part thereof, and whenever such Indian shall have an additional ten acres under cultivation, he or she shall be entitled to a certificate for additional forty acres, and so on, until the full amount of one hundred and sixty acres may have been certified to any one Indian; and the land so held by any Indian shall be exempt from taxation and sale for debt, and shall not be alienated except with the approval of the Secretary of the Interior, and in no case to any person not a member of the Chippewa tribe.

Under the Act of 1904, additional allotments were made on the reserved portion of the White Earth Reservation to the Chippewa Indians of Minnesota then residing thereon. The acreage so additionally allotted amounted to a total of 251,322.64 acres in excess of the total acreage which the allottees would have received if they had been limited to 80 acres each. Upon the lands thus additionally allotted, there were 216,305,000 feet of White and Norway pine.

The court decided that the plaintiffs were not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

This case was heard and submitted under Rule 39 (a) upon the question of plaintiffs' right to recover. The questions with reference to the value of property, which plaintiffs allege was unlawfully allotted, and as to such offsets as might be proper, in the event plaintiffs should be held entitled to recover, were reserved for future consideration, if necessary. No findings have therefore been made with respect to these questions.

Under the civilization act of 1889, all the bands and tribes of the Chippewa Indians in Minnesota living on twelve distinct reservations ceded to the United States, in trust, under an agreement duly entered into pursuant to an Act of Congress, all their title and interest in and to the reservation occupied by them, except the White Earth and Red Lake reservations, as to which a portion of each was reserved from the cession and the remainder ceded to the United States in trust for disposition for the benefit of the Indians. This act provided for the removal to the White Earth Reservation of all other Indians from all other reservations, except the Red Lake Reservation, and it further provided for allotments in conformity with the Act of 1887 on the reserved portion of the White Earth Reservation to the Indians originally there and to those removed. It was provided, however, that any Indian, in his own discretion, might decline to be removed and might take his allotment on the reservation on which he resided. Many of the Indians did so. The general allotment act of 1887, before amendment, provided for an allotment of 160 acres to each head of a family, of 80 acres to each single person over 18 years of age, of 80 acres to each orphan child under 18 years of age, and of 40 acres to each other single person under 18 years of age. Before any allotments had been made under the civilization act of 1889, the general allotment act of 1887 was amended by the Act of February 28, 1891, which fixed 80 acres as the amount of land to be allotted to each person. The Department of the Interior construed the amendatory act of 1891 as amending the previous acts and as fixing the area to be allotted to each Chippewa at 80 acres and allotments were made accordingly.

Allotments of more than 40 acres each were made to single persons under 18 years of age other than orphans, the aggregate excess over the total acreage which the allottees would have received at 40 acres each being 136,487.88 acres, divided as follows: (1) on the reserved portion of the White Earth Reservation, 88,978.74 acres, and (2) on other reservations, 47,508.14 acres. Plaintiffs seek to recover the value of this excess acreage allotted, at $1.25 per acre.

The Act of April 28, 1904, known as the Steenerson Act, provided that allotments, or sufficient additional allotments, be made from the reserved portion of the White Earth

Reservation to the White Earth Indians and to other Minnesota Chippewas who had been removed to the White Earth Reservation and who were entitled to the benefits of the treaty with the Chippewa Indians of Mississippi, proclaimed April 18, 1867, 16 Stat. 719, so that each allottee would receive 160 acres in all.

Additional allotments were made from the reserved portion of the White Earth Reservation under the Act of 1904, of 251,322.64 acres in excess of the total which the allottees would have received at 80 acres each under the Act of 1891. The lands so additionally allotted contained a large quantity of merchantable pine timber. Plaintiffs seek to recover the value of the excess acreage so allotted, together with the value of the timber thereon, in the total amount of $3,600,978.65.

Plaintiffs contend in support of their claimed right to recover for the lands additionally allotted pursuant to the acts of 1891 and 1904 that the civilization act of 1889 and the agreement approved March 4, 1890, made thereunder, obligated the Government to make allotments in strict conformity with the general allotment act of 1887 and that allotments, or additional allotments of increased acreages made, as subsequently directed by Congress, were unlawful and in violation of the acts of 1887, 1889, and the agreement of 1890.

Plaintiff also contends that any surplus lands and the timber thereon remaining on the diminished White Earth Reservation, after allotments had been made in conformity with the acts of 1887 and 1889, became "ceded lands" and, therefore, "trust lands," to be sold for plaintiffs' benefit, and that, when additional lands therefrom were allotted to the Chippewas, the defendant violated the trust imposed and plaintiffs became entitled to recover compensation for the value thereof.

On the other hand, defendant contends that the enactment of the civilization act of 1889, and the approval of the agreements made thereunder, did not deprive Congress of its lawful plenary power over the Indian tribes and their properties to direct changes in the amount, or amounts, of land to be allotted to the individual Chippewas, and that the changes which were directed by Congress in the subsequent acts of

Opinion of the Court

1891 and 1904, which the Department of the Interior effectuated, were lawful and plaintiffs were not injured and are not entitled to recover from the United States the value of the lands additionally allotted. Defendant also contends that the reserved portion of the White Earth Reservation was not ceded under the Act of 1889, or otherwise; that the rights and property interest therein remained in a group of Indians which includes only a portion of all the Chippewa Indians of Minnesota; that the plaintiffs, as *all* the Chippewa Indians of Minnesota, have never acquired any property interest therein and cannot recover because of the manner in which that area has been managed.

We are of opinion that the position of the defendant is correct and that plaintiffs are not entitled to recover.

The Chippewa Indians of Minnesota were tribal Indians both before and after the enactment of the civilization act of 1889. The property involved was tribal property. *Gritts* v. *Fisher*, 224 U. S. 640; *Fairbanks* v. *United States*, 223 U. S. 215; *Oakes* v. *United States*, 172 Fed. 305; *Leecy* v. *United States*, 190 Fed. 289. And these Indians and their properties were at all times prior and subsequent to the Act of 1889 subject to the plenary control of Congress. These questions were submitted and decided adversely to plaintiffs in *Chippewa Indians of Minnesota* v. *United States*, 88 C. Cls. 1, affirmed 307 U. S. 1. The present case differs from that case only in that the former was predicated upon the alleged mismanagement of tribal funds, and the proceeds of tribal land and timber, while the instant case is upon the alleged mismanagement of unsold tribal lands and timber. But whatever form the tribal property takes, its management by Congress is governed by the same principles of law. In *Chippewa Indians of Minnesota* v. *United States*, *supra*, the Supreme Court said:

> The appellants assert that, by the Act of 1889, Congress abdicated its plenary power of administration of the Chippewas' property as tribal property, recognized that the reservations of the respective bands were not tribal property, and agreed to hold the proceeds of the ceded lands in strict and conventional trust for classes of individual Indians in accordance with the program outlined in the Act (p. 3).

* * * * *

If, as the Court of Claims has found, the Act of 1889, and the cessions made pursuant to it, did not create a technical trust, we are relieved from considering many of the contentions pressed by the appellants * * *. We are of opinion that the Court of Claims was right in its decision that no such trust was created (p. 3).

* * * * *

It is true that, prior to the adoption of the Act of 1889, the tribe had been broken up into numerous bands, some of which held Indian title to tracts in the State of Minnesota. * * * Whether or not the tribal relation had been dissolved prior to its adoption, the Act contemplates future dealings with the Indians upon a tribal basis. It exhibits a purpose gradually to emancipate the Indians * * *. But it is plain that, in the interim, Congress did not intend to surrender its guardianship over the Indians or to treat them otherwise than as tribal Indians (p. 4).

* * * * *

We hold that the Act did not tie the hands of Congress so that it could not depart from the plan envisaged therein, in the use of the tribal property for the benefit of its Indian wards (p. 5).

Upon the facts disclosed and the authorities cited, it is clear that plaintiffs are not entitled to recover in this proceeding for the reason that the additional allotments involved, and complained of, were lawfully made.

With reference to an additional contention advanced by plaintiffs that the amendatory act of 1891 never became applicable to the Chippewa Indians of Minnesota for the reason that the President never directed the manner in which they should consent, it is sufficient to say that the Secretary of the Interior, acting with reference to a matter appertaining to his especial duty, may be regarded as having spoken and acted for the President in the premises. *Wilcox* v. *Jackson*, 13 Pet. 498, 512, 513; *Hegler* v. *Faulkner*, 153 U. S. 109, 117; *McElrath* v. *United States*, 102 U. S. 426; *Weller* v. *United States*, 41 C. Cls. 324, 335; *Belt* v. *United States*, 15 C. Cls. 92, 107. Moreover, the Chippewa Indians of Minnesota accepted the additional allotments made and no protest was made at the time. Every act with reference to the making of allotments was under the direction of the Secretary of the Interior

and while the records of that department do not disclose any vote or agreement prior to actual allotment, we think a complete consent to the amendatory act of 1891 was nevertheless given by the Chippewa Indians of Minnesota when they, without exception, accepted their allotments thereunder. The manner of giving consent is unimportant when the consent itself is shown to be actual.

The petition must be dismissed, and it is so ordered.

WHITAKER, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice,* concur.

THE SEMINOLE NATION v. THE UNITED STATES

[No. L-89. Decided January 8, 1940]*

On the Proofs

Indian claim; purpose of Government as to former slaves, or freedmen, of Indian tribes; property rights.—Decided upon the authority of *Seminole Nation* v. *the United States*, 78 C. Cls. 455.

The Reporter's statement of the case:

Mr. Ernest L. Wilkinson for the plaintiff. *Messrs. Paul M. Niebell, Frank J. Boudinot, John W. Cragun* and *W. W. Pryor* were on the briefs.

Mr. Charles H. Small, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Mr. Raymond T. Nagle* was on the briefs.

The court made special findings of fact as follows:

1. The plaintiff, purporting to be "The Seminole Nation" which is authorized to bring suit under the act of May 20, 1924 (43 Stat. 133), constitutes only approximately two-thirds of the membership of the Seminole Nation, and is not the entire Seminole Nation or Tribe described in the act.

2. For many years prior to the Civil War the Seminole Indians were inhabitants of the Territory of Florida.

*Certiorari denied May 27, 1940.

After negotiations commenced in about 1832 between the Government and the Indians concerning the proposed emigration of the tribe to country west of the Mississippi River, the Seminoles were gradually removed, beginning in about 1845, from Florida to Indian Territory. When the Civil War came upon the country the great majority of the Indians comprising this nation or tribe were inhabitants of Indian Territory. These Indians were the owners of a considerable number of slaves which had migrated with the tribe from Florida to Indian Territory and there continued to bear the same relationship as from the beginning. When the Civil War broke out, the Seminoles joined with the other tribes designated as the Five Civilized Tribes, and entered into a treaty with the Confederacy. Slave ownership by the Seminoles was then somewhat extensive. After the war was over the Seminole Nation or Tribe found itself under the necessity of negotiating new treaties with the United States.

3. Shortly after the termination of the Civil War a Commission was appointed by the President to represent the Government in the making of treaties with various Indian tribes, including the Seminole Nation. This Commission held many councils at Fort Smith, Arkansas, beginning September 8, 1865, with the delegates representing each of the Five Civilized Tribes (of which the Seminole Nation was one), and other Indian nations and tribes. Upon the opening of the proceedings on September 8, 1865, the tribes were informed generally of the object for which the Commission had come to them. At the council meeting of September 9, 1865, the Indian delegates were informed that the Commissioners were empowered to enter into treaties with the tribes for the purpose of settling several indicated propositions. The Commissioners declared among other things that the United States desired—

> Slavery to be abolished, and measures to be taken to incorporate the slaves into the tribes, with their rights guaranteed.

Printed copies of the address of the Commissioners setting forth the propositions advanced by the Government were

placed in the hands of the agents and of members of the tribes, many of whom were educated men. On September 10, 1865, the loyal Seminoles present at the council meeting expressed their willingness to accede to the policy of the Government.

4. Following the negotiations conducted at Fort Smith, a treaty was entered into on September 13, 1865, between the Commissioners representing the United States, and delegates on behalf of ten of the Indian tribes, including the Seminole Nation, represented at these councils. This treaty, while never ratified (2 Kapp. 1050), formed one of the bases of the treaty of March 21, 1866, between the United States and the Seminole Nation (14 Stat. 755).

5. On March 21, 1866, a treaty was concluded between the Seminole Nation and the United States (14 Stat. 755) at Washington. Article II of this treaty provided as follows:

> The Seminole Nation covenant that henceforth in said nation slavery shall not exist, nor involuntary servitude, except for and in punishment of crime, whereof the offending party shall first have been duly convicted in accordance with law, applicable to all the members of said nation. And inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color who may be adopted as citizens or members of said tribe.

The Seminole Indians understood and knew that the rights which they were granting to their former slaves by this treaty were equal rights in all tribal property as well as civil and other rights.

6. By the act of March 3, 1893 (27 Stat. 612, 645), Congress inaugurated its policy of extinguishing Indian tribal lands, allotting the same in severalty among those entitled to receive them, and distributing Indian tribal funds. By this

act a Commission known as the Dawes Commission was created to enter into negotiations with the Five Civilized Tribes, of which the Seminoles were one, whereby agreements might be procured to accomplish the Governmental purpose.

7. On June 10, 1896 (29 Stat. 321), the authority of the Dawes Commission was extended. The Commission was authorized by this act to hear and determine the applications of all persons who might apply for citizenship in any of the Five Civilized Tribes, and thereafter to make a complete roll of the citizenship of each tribe, and also a roll of freedmen entitled to membership therein, and to include the names of the freedmen in the official lists or rolls of members of the tribes.

8. During the preparation of the citizenship rolls of the Five Civilized Tribes, Congress enacted what is known as the Curtis Act. The Curtis Act (30 Stat. 495) is a detailed and comprehensive one having to do with every phase of Indian rights and property brought about through the policy of the Government, of extinguishing Indian tribal lands and disposing of the same and the proceeds thereof. The Curtis Act directed and authorized the Dawes Commission to proceed "to allot the exclusive use and occupancy of the surface of all the lands" to the Indians when the rolls of citizenship were "completed as provided by law." By the Curtis Act the authority of the Commission to make correct enrollment was continued, the act providing (30 Stat. 503) that—

> The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

9. On July 1, 1898, an agreement (30 Stat. 567) was concluded between the Dawes Commission on behalf of the United States and duly appointed and authorized Commissioners on behalf of the Seminole Nation. This agreement, which involved the allotment of the lands and distribution

of the tribal funds of the Seminole Nation, provided among other things that the lands of said tribe should

> * * * be divided among the members of the tribe so that each shall have an equal share thereof in value, * * *

This agreement approved July 1, 1898 (supra), provided in part, in respect of Seminole tribal funds, that:

> All moneys belonging to the Seminoles remaining after equalizing the value of allotments as herein provided * * * shall be paid per capita to the members of said tribe in three equal instalments, the first to be made as soon as convenient after allotment * * * and the others at one and two years, respectively.

10. On June 2, 1900, the Dawes Commission on behalf of the United States, and duly appointed and authorized Commissioners on behalf of the Seminole Tribe of Indians, concluded an agreement—referred to generally as the "supplemental agreement"—in respect to the final rolls of Seminole citizens, upon which the allotment of lands and distribution of money and other property belonging to the Seminole Indians should be made. This agreement provides in part as follows (31 Stat. 250):

> FIRST.—That the Commission to the Five Civilized Tribes, in making the rolls of Seminole citizens, pursuant to the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, shall place on said rolls the names of all children born to Seminole citizens up to and including the thirty-first day of December, eighteen hundred and ninety-nine, and the names of all Seminole citizens then living; and the rolls so made, when approved by the Secretary of the Interior, as provided by said Act of Congress, shall constitute the final rolls of Seminole citizens, upon which the allotment of lands and distribution of money and other property belonging to the Seminole Indians shall be made, and to no other persons.

11. The preliminary roll of Seminoles by blood and Seminole freedmen was completed by the Dawes Commission in 1899. Separate rolls were made as to Seminoles by blood

and Seminole freedmen. The rolls thus made were approved by the Secretary of the Interior on April 2, 1901, and, except for an authorization to extend them for the purpose of enrolling certain infant children, by the Act of Congress of March 3, 1905 (33 Stat. 1048, 1071), and the lands and tribal funds of the Seminole Nation or Tribe were allotted and distributed in accord with the final rolls of the Commission and the laws of Congress. The Seminole Indians, with full knowledge, consented to the allotments by the Commission. The evidence does not show the value of the lands allotted or the amount of funds distributed to the freedmen.

12. The final rolls of citizens and freedmen of the Five Civilized Tribes in Indian Territory prepared by the Dawes Commission and the Commissioner to the Five Civilized Tribes and approved by the Secretary of the Interior on or prior to March 4, 1907, which were compiled and printed under authority conferred by the Act of Congress approved June 21, 1906 (34 Stat. L. 325) show, at pages 615–634 thereof, the names of 2,147 Seminole citizens by blood and 986 freedmen citizens of the Seminole Nation or Tribe.

13. The final roll of citizens by blood and freedmen citizens of the Seminole Nation prepared by the Dawes Commission and approved by the Secretary of the Interior in 1901 was based chiefly upon the Seminole tribal roll of 1897. This roll was delivered to the Dawes Commission on July 1, 1898, by the Governor of the Seminole Nation with the explanation that it had been prepared in 1896 by the Seminole tribal officials, verified by the Chief of each Band as to the members thereof, in accordance with the manner in which the Seminole rolls had been made for years past, and was the identical roll on which the head right payment of 1897 had been based. The roll was delivered to the Dawes Commission in response to its request for the tribal rolls of the Seminole Nation. This identification of the parties named on the roll was, in every instance, made by members of the Seminole council, a large number of whom, at the request of the Dawes Commission and upon the advice of the Governor of the Seminole Nation, was

present at the times of identification and assisted the Dawes Commission in the work of enrollment.

The final roll contains opposite the names thereon, certain data concerning the enrollees. In addition to other information, the roll shows opposite the name of each enrollee, whether Seminole by blood or freedman, and the name of the tribal band of which the enrollee was a member.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This case first came before the court on a demurrer to the petition and the demurrer was sustained on November 6, 1933. The plaintiff amended the petition and the case is now presented on its merits. The amendment to the petition presents no new and material issue, nor does it amplify the petition so that it states a new cause of action.

The sole issue is one of law. Plaintiff contends that under the treaty of 1866 in which the freedmen were admitted into this nation as native citizens, provision was made for political rights only and participation in the tribal property along with the Indians by blood was not included, and that the inclusion of nine hundred odd freedmen in the division of tribal funds and lands on the same basis as the Indians by blood was illegal and wrongful. The question presented is identical with that which was raised by the demurrer and which was decided by Chief Justice Booth in a learned and elaborate opinion, *Seminole Nation* v. *United States*, 78 C. Cls. 455.

We can see no benefit to be gained by another opinion on this issue. Chief Justice Booth covered the issue in such a clear and convincing opinion that nothing can be added to it. We not only adhere to that decision but we adopt it as the decision in this case.

The petition is dismissed. It is so ordered.

WHITAKER, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

G. G. LOEHLER, TRADING AS G. G. LOEHLER COMPANY v. THE UNITED STATES

[No. 42555. Decided January 8, 1940]

On the Proofs

Government contract; school grounds not authorized to be used for playgrounds.—Contractor entered into contract with the Government to supply all labor and material and to construct bathhouse, swimming pool, and other playground structures on high-school grounds in the city of Washington, D. C., and began work on the contract; whereupon contractor received notice that the Comptroller General ruled the contract was illegal inasmuch as the appropriation for the work stipulated that the pools, etc., should be located "upon lands acquired or hereafter acquired for park, parkway, or playground purposes," and contractor discontinued work upon receipt of such notice.

Held:

The contract in question was unauthorized, illegal, and unenforceable.

Same.—Land dedicated to one public purpose may not be diverted to another purpose.

Same.—The restriction by the statutes of the sites of certain authorized structures to lands acquired or hereafter acquired for park, parkway, or playground purposes excludes the use of land acquired for school purposes.

The Reporter's statement of the case:

Mr. Howe P. Cochran for the plaintiff. *Margaret F. Luers* was on the brief.

Mr. A. B. Holman, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact, as follows:

1. The plaintiff entered into a contract with the defendant October 6, 1927, whereby he agreed to furnish all labor and materials, and perform all work required for the construction of a bathhouse, swimming pool, beginners' pool, pump and filter room, pergola and shelter, and two sand boxes, together with plumbing and electrical work, brick

and concrete paving, mechanical equipment and piping for filling, emptying, and cleaning the pools, and for recirculating and purifying the water in the pools, on McKinley High School Grounds, Washington, D. C., for the consideration of $79,950.00, the work to be commenced October 14, 1927, and be completed April 29, 1928. The contracting officer for the United States was U. S. Grant, 3d, Director, Office of Public Buildings and Public Parks of the National Capital.

2. Plaintiff commenced work promptly upon the signing of the contract. While engaged on the work plaintiff entered into a supplemental contract with defendent November 2, 1927, providing for additional work of hauling excavated material from the site, at a rate of 40 cents per cubic yard, bank measurement.

3. While the work was still in progress plaintiff in due course received the following letter from the contracting officer dated December 14, 1927:

> Confirming our telephonic advises of yesterday, I regret to inform you that the Comptroller General of the United States has decided that the contract between this office and your company for constructing a swimming pool, beginners' pool, and bathhouse on the McKinley High School grounds, is illegal for the reason that the act authorizing the construction of the pools provided that they should be located "upon lands acquired or hereafter acquired for park, parkway, or playground purposes," while the land upon which the McKinley High School pools are to be built was purchased for school purposes.
>
> I have already asked the General Accounting Office to review its decision, and I think most likely that the necessary authority for continuing the construction may be obtained in the near future. In the meantime, however, I must notify you that no further payments can be made under your contract unless and until such authorization is secured. If you care to do so, you are at liberty to continue work, but any work done will be at your own risk and can create no obligation against the United States unless favorable action is taken to validate your contract and the location of the pools.

Plaintiff responded to this December 15, 1927, as follows:

> We beg to acknowledge receipt of your letter of December 14, 1927, in which you notified us that no further payments can be made under our contract for the construction of Swimming Pool, Beginners' Pool and Bath House on the McKinley High School grounds, due to the fact that the Comptroller General of the United States holds that our contract is illegal, for the various reasons set forth in your letter.
>
> We should like to advise you that we do not wish to proceed with the work at our own risk, and have, therefore, stopped work in connection with our contract.
>
> We shall hold this work in abeyance until we are officially informed by your Office to proceed with same.
>
> The debts incurred on this job to date are far in excess of the amount received by us from your office; therefore, we trust that this matter will be settled at an early date.

Thereafter plaintiff performed no more work and furnished no more material on the job.

4. Plaintiff's bid of $79,950.00, the original contract price, had been estimated on a prospective cost of $57,890.00 and profit of $22,060.00. The price realized on the supplemental contract for extra hauling was $2,849.60, the cost thereof was $2,137.20, with profit of $712.40. The total of this estimated and actual profit was therefore $22,772.40.

At the time of stopping work, plaintiff had expended on the original contract, including overhead, $21,103.14, and on the supplemental contract $2,137.20, a total cost of $23,240.34. His receipts from the defendant, in payment of the combined contract price of $82,799.60, were $23,472.60, making the profit on both contracts actually realized $232.26, as against the combined estimated and actual profit of $22,772.40, a difference of $22,540.14.

5. On December 17, 1927, plaintiff assigned all his assets, including the contract in suit, over to G. G. Loehler Construction Company, Inc., a corporation, and in consideration received most of the stock of the corporation.

6. On May 16, 1928, there was approved the Independent Offices Act, 1929 (45 Stat. 573, 583), providing that a portion of the site of the McKinley High School and the Lang-

ley Junior High School be made available for one of the pools authorized by the Act approved May 4, 1926.

7. On November 7, 1928, plaintiff was advised by letter from the office of the contracting officer that November 16, 1928, had been fixed as the date on which the work was to be resumed on the contract, and G. G. Loehler Construction Co., Inc., thereafter proceeded to finish the work.

8. A contract was entered into February 15, 1929, between G. G. Loehler Construction Co., Inc., and the defendant, which purported to substitute the corporation as the contractor on the original contract with plaintiff of October 6, 1927. A copy of this contract, together with correspondence referred to therein, is filed in the case as defendant's Exhibits 2 and 3 and is made part hereof by this reference.

The court decided that the plaintiff was not entitled to recover.

Williams, *Judge*, delivered the opinion of the court:

Plaintiff brings suit to recover damages because of the alleged breach of a contract entered into between plaintiff and the United States whereby plaintiff agreed to furnish all labor and materials, and perform all work required for the construction of a bath house, swimming pool, beginners' pool, pump and filter room, pergola and shelter, and two sand boxes, together with plumbing and electrical work, brick and concrete paving, mechanical equipment and piping for filling, emptying, and cleaning the pools, and for recirculating and purifying the water in the pools, on McKinley High School Grounds, Washington, D. C., for the consideration of $79,950, the work to be commenced October 14, 1927, and be completed April 29, 1928. A supplemental contract was entered into providing for additional work of hauling excavated material from the site, at a rate of 40 cents per cubic yard, bank measurement.

Plaintiff promptly began work under the contract. However, on December 14, 1927, the contracting officer wrote plaintiff informing him that the Comptroller General of the United States had decided the contract was illegal on the

ground that the act of May 4, 1926 (44 Stat. 394), authorizing the construction of the pools provided that they should be located "upon lands acquired or hereafter acquired for park, parkway, or playground purposes," while the land upon which the pools were being built had been acquired for school purposes. The letter further stated that the General Accounting Office had been asked to review its decision but informed the plaintiff that no further payments could be made unless and until an authorization would be received. The letter then stated that the plaintiff could proceed with the work if he chose to do so, but only at his own risk, without creating any obligations on the part of the Government unless action should be taken to validate the contract and the location of the pools. Plaintiff replied to this letter on the following day, December 15, 1927, saying:

> We shall hold this work in abeyance until we are officially informed by your office to proceed with same.

Thereafter the plaintiff performed no more work and furnished no more material on the job. Up to this time the plaintiff had expended the sum of $23,240.34 and had received from the defendant in payment therefor $23,472.60.

Thereafter Congress, in the Independent Offices Act, 1929, made available for the construction of one of the pools the site involved in this case, and on November 7, 1928, plaintiff was advised by letter from the contracting officer that November 16, 1928, had been fixed for the date of resumption of work on the contract.

In the meantime, however, plaintiff had assigned all his assets, including the contract involved in this case, to the G. G. Loehler Construction Co., Inc., a corporation, in consideration of most of the stock of that corporation. The contracting officer was informed of this fact on February 11, 1929, and on February 15, 1929, the defendant and the G. G. Loehler Construction Co., Inc., entered into a contract which purported to substitute the corporation as the contractor in the original contract with plaintiff. This contract recited the assignment by plaintiff to the corporation, stated that the name of G. G. Loehler, an individual, trading

Opinion of the Court

as the G. G. Loehler Co., is changed to the G. G. Loehler Construction Co., Inc., and modified the original contract in that "the name of the contractor will hereafter be known as the G. G. Loehler Construction Co., Inc." The corporation thereupon proceeded with the work of completing the contract.

The defendant contends that plaintiff is not entitled to recover for the following reasons: (1) that the contract of October 6, 1927, was invalid; (2) that the contract was not breached by the defendant; (3) that plaintiff has failed to establish that he sustained damages in any amount whatever; and (4) that plaintiff by assigning the contract disabled himself from performance.

The improvements covered in the contract were authorized by the act of May 4, 1926.[1] The pools were to be located upon lands acquired or thereafter acquired for park, parkway, or playground purposes. These terms have a well-established and definite signification. The pools provided for in the contract were not located on lands acquired for park, parkway, or playground purposes but instead were located on ground acquired specifically for and dedicated to school purposes. The rule is generally established that land dedicated to one public purpose may not be diverted to another purpose. *United States* v. *Illinois Cent. R. Co.*, 26 Fed. cases, Case No. 15437, page 461; *Rowzee* v. *Pierce*, 75 Miss. 846; *Board of Education* v. *Kansas City*, 62 Kan.

[1] Act of May 4, 1926 (c. 234, 44 Stat. 394):

"* * * That the Director of Public Buildings and Public Parks of the National Capital be, and he is hereby, authorized and directed to locate and construct, * * * two artificial bathing pools or beaches in the District of Columbia, one pool for the white race and the other for the colored race * * *. The cost of these pools or beaches, with buildings and equipment, shall not exceed $345,000, and the appropriation of such sum for the purposes named is hereby authorized. No part of the sums appropriated for the purposes of this Act shall be expended for the purchase of land, and the pools or beaches herein provided for shall be located upon lands acquired or hereafter acquired for park, parkway, or playground purposes."

374; *Kelly* v. *Town of Hayward*, 192 Cal. 242. In the case of *Bauer* v. *Mitchell*, 247 Mass 522, the court stated:

> * * * The land in question was bought solely for the school under the definite provisions of a statute enacted with single reference to this particular school. * * * The appropriation by the county commissioners as trustees of the hospital of land bought for and dedicated to the uses of the school against the protest of the trustees of the school was without legal right. Explicit legislation to that end would have been necessary before such authority could have been exercised. * * *

In *McCullough* v. *Board of Education*, 51 Cal. 418, the defendant contracted with the plaintiff for the construction of a schoolhouse on a portion of a public square. The court said:

> The contract of the Board of Education, upon which the suit is founded, was consequently *ultra vires* in the extreme sense, and the plaintiff could derive no rights thereunder, since he was bound to take notice that the Board of Education could not, under any circumstances, acquire a right to occupy a public square for school purposes.

In the light of these decisions the Comptroller General's ruling that the contract in question was unauthorized and unenforceable was justified. The restriction by the statutes of the sites of the authorized pools to lands acquired or hereafter acquired for park, parkway, or playground purposes, of necessity excludes the use of land acquired for school purposes, since that would constitute diversion of land dedicated for one specific use to another public use inconsistent with the original dedication, without plain and explicit legislation to that end. It therefore must be held that the contract here involved was illegal and unenforceable against the United States. Since this is so plaintiff is not entitled to recover and it becomes unnecessary to consider the other defenses imposed herein. The petition will be dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

ANDREW J. VLACHOS v. THE UNITED STATES

[No. 42835. Decided January 8, 1940]

On the Proofs

Appointment of assistant to United States District Attorney.—Authority to employ and retain, in the name of the United States, attorneys to assist the district attorneys is vested by statute solely in the Attorney General of the United States.

Same; constructive knowledge.—An attorney accepting an appointment as assistant to the United States attorney was charged with constructive knowledge of the conditions of the appointment.

Same; implication.—He who is without authority to bind his principal by an express contract cannot be held to have done so by implication.

The Reporter's statement of the case:

Mr. Thomas C. McConnell for the plaintiff.

Mr. Henry A. Julicher, with whom was the *Assistant Attorney General*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is, and was during the times herein involved, a citizen of the United States and a regularly licensed practitioner of the law with offices in Chicago, Illinois, and resides in that city.

He received an education in Greece, and in 1901 graduated from the law school of the National University of Greece in Athens. He came to the United States in 1902 and studied law also at Northwestern University and at the Hamilton College of Law. He has been practicing law in Chicago since 1916.

His knowledge of the Greek language, of Grecian law, of the English language, and American law, and of the special meaning of legal terms in both countries, together with his scholastic attainments, practical experience, and acquaintance with international law and with the political forces in Greece, made him peculiarly fitted for the work for which he was employed by the defendant, and which forms the subject matter of this suit.

The plaintiff went to Greece in connection with the first extradition case of Samuel Insull, which required him, among other things, to study the extradition treaty between the United States and Greece. His study of that treaty revealed certain discrepancies between the Greek and American texts that materially affected the outcome of the case.

2. On the 19th of May, 1933, plaintiff was approached by Dwight H. Green, at that time U. S. District Attorney in Chicago, in company with a Mr. Harness, and was asked by Mr. Green if he could give his time in rendering service to the United States Government in a new extradition proceeding against Samuel Insull which might be instituted. The plaintiff expressed his willingness to assist the United States in the new Insull proceedings and Mr. Green recommended and expected that the plaintiff would be sent to Greece in connection with the trial of the case of *United States* v. *Samuel Insull et al.* The United States Attorney communicated with the Attorney General and recommended appointment of plaintiff as a Special Assistant United States Attorney to assist his office in the extradition trial mentioned.

The following day Mr. Green informed the plaintiff that $4,000 per year, plus expenses of the trip to Greece, had been fixed upon as his compensation. It was Mr. Green's understanding that the plaintiff would be sent to Greece.

3. It was the office of the district attorney to recommend to the Attorney General the appointment of special assistants to the district attorney, and he recommended to the Attorney General the appointment of plaintiff as his assistant, to perform the duties discussed with the plaintiff.

He was accordingly appointed May 20, 1933, by the Attorney General and by him required to execute the usual oath of office, which he did on May 22, 1933.

The letter of appointment of May 20, 1933, was addressed to the plaintiff and is as follows:

> You are hereby appointed a Special Assistant to the United States Attorney, northern district of Illinois, under the authority of the Department of Justice, to assist the United States Attorney in such special cases

> and matters as may be assigned to you by said United States Attorney.
>
> Your compensation will be at the rate of $4,000 per annum, commencing with entry on duty and payable from the appropriation for "Pay of Special Assistant Attorneys, United States Courts."
>
> Your headquarters are fixed at Chicago, Illinois.
>
> Please execute and forward the required oath of office and affidavit.

This letter of appointment was not delivered to the plaintiff.

Upon receipt of the letter of appointment by the United States Attorney, plaintiff was again notified of his appointment, whereupon plaintiff executed the following oath of office:

> I, Andrew J. Vlachos, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office of Special Assistant to the United States Attorney for the Northern District of Illinois Eastern Division to assist in the investigation, preparation, and trial of the case of *U. S.* vs. *Samual Insull et al.*, for violation of Section 29 B of the Bankruptcy Act of the United States as amended pursuant to letter of appointment of the Attorney General of the United States on which I am about to enter: So help me God.

Plaintiff thereafter regularly prepared vouchers, which were signed by United States Attorney Green, and received a total of $1,218 for the duration of his appointment as compensation at the rate of $4,000 per annum.

4. Plaintiff proceeded in the work of assisting in the investigation and preparation of the case against Insull.

About the first of June 1933, the district attorney instructed plaintiff to prepare for the trip to Greece and on his way stop at Washington, D. C. He made the necessary preparations, and took his luggage and books to Washington. He there conferred with officials in the Department

of Justice and in the Department of State, and at their request enlightened them about his knowledge and experience in the previous extradition case.

There were numerous records to be translated into Greek and plaintiff was given them to translate and by Mr. Green required to return in secrecy to his Chicago home, there to do this work without his clients' knowledge.

After the completion of this work, which was arduous and required much night work, plaintiff was on August 22, 1933, told by Mr. Green that he had just received word from Washington that another person had been selected to go to Greece and there take plaintiff's place.

Whereupon plaintiff vigorously protested against the substitution as a violation of the terms of his employment. The United States Attorney did not use plaintiff as a trial attorney in the case.

The Attorney General addressed the plaintiff December 6, 1935, by letter as follows:

> Your appointment as a Special Assistant to the United States Attorney, Northern District of Illinois, is hereby terminated effective at the close of business September 30, 1933.

5. The fair and reasonable value of the services actually performed by the plaintiff at an hourly rate on a *per diem* basis is not less than $3,762.50.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

It will be seen from the findings that plaintiff seeks to recover the amount of $2,544.50 in addition to the compensation of $1,218 paid to him at the rate of $4,000 per annum for the duration of his appointment by the Attorney General of the United States as a special assistant to the United States Attorney at Chicago, Illinois. Plaintiff bases his claimed right to recover this amount upon an alleged agreement between himself and Dwight Green, U. S. Attorney for the Northern District of Illinois, for compensation on a

per diem basis in the event plaintiff was not sent to Greece in connection with the extradition trial of the case of the *United States* v. *Samuel Insull, Sr., et al.* The testimony of record is in direct conflict with reference to an agreement which plaintiff alleges he had with the United States Attorney to the effect that he would be paid for his services upon a time basis if he should not be sent to Greece as counsel for the United States in the extradition trial. Plaintiff states that the terms and conditions of his employment were stated to the United States Attorney for the Northern District of Illinois in the alternative: first, that should he be sent to Greece he would accept a reasonable salary plus traveling expenses in view of the prestige it would give him in being sent to Greece in a case of international character; but, second, if he were not sent to Greece, and did his work in Chicago, he would not be able to get away from his clientele, would have to give part of his time to them, and could devote only the remainder to the work in the extradition case, for which he would have to be paid on the basis of time and service. Plaintiff further testified that the amount of his compensation, either on an annual basis or on the basis of time and service, was not discussed with the United States Attorney for the reason that both he and the United States Attorney expected that plaintiff would be sent to Greece as an attorney of the United States in the case under consideration. The United States Attorney testified positively that he did not employ plaintiff or have any understanding or agreement with him that he would be paid on the basis of $4,000 a year if he was sent to Greece and that if he did not go to Greece that he would be paid compensation at an hourly rate on a per diem basis. The United States Attorney further testified that plaintiff did not discuss or have any conference with him with reference to additional compensation other than that fixed by the Attorney General or on any other basis for services rendered during the period of his appointment until after plaintiff had completed the work performed by him as a special assistant to the United States Attorney in translating certain documents in connection

with the case of the *United States* v. *Insull*. The United States Attorney further testified that he did not have any discussion with plaintiff with reference to the basis of his compensation or what compensation he might receive in the event he was not sent to Greece. But we need not further discuss or undertake to reconcile this conflicting testimony for the decision of the question presented is controlled by other considerations. The United States Attorney was without authority to employ a special assistant and to fix his compensation and bind the United States to pay the same. This power resided exclusively by statute in the Attorney General of the United States and the only authority possessed by the United States Attorney was to make recommendations to the Attorney General. *United States* v. *Crosthwaite*, 168 U. S. 375, 378, 379; *Garter* v. *United States*, 31 C. Cls. 344, 352, 353, affirmed 170 U. S. 527; *Smith* v. *United States*, 26 C. Cls. 568, 574; *Lee* v. *United States*, 45 C. Cls. 57; *United States* v. *Rosenthal*, 121 Fed. 862, 868; *United States* v. *Virginia-Carolina Chemical Co.*, 163 Fed. 66, 72.

On May 19, 1933, the United States Attorney at Chicago conferred with plaintiff with reference to having him appointed special assistant to the United States Attorney to assist in the extradition trial in the case of *United States* v. *Insull*. As a result, the United States Attorney recommended to the Attorney General the appointment of plaintiff and, on the following day, the United States Attorney advised plaintiff that he would be appointed and that compensation at the rate of $4,000 a year plus expenses of the trip to Greece had been fixed as his compensation. On May 22, 1933, the Attorney General appointed plaintiff a special assistant to the United States Attorney for the Northern District of Illinois with headquarters at Chicago and fixed the compensation at the rate of $4,000 a year. This appointment was in writing and was addressed to plaintiff in care of the United States Attorney at Chicago, Illinois. With this appointment there was enclosed an oath of office which plaintiff duly executed, all as set forth in finding 3. Plaintiff was not sent to Greece, and performed cer-

tain services as a special assistant to the United States Attorney at Chicago. Plaintiff regularly prepared vouchers for his compensation at the rate of $4,000 per annum which were sent and approved by the United States Attorney in the amount of $1,218 for the duration of his appointment, which he received and accepted without protest both before and after he was advised that he would not be sent to Greece. In these circumstances, plaintiff cannot recover from the United States any greater sum in view of the provisions of sections 363 and 366 of the Revised Statutes; Title 5, U. S. C. A., sections 312 and 315, which are as follows:

> SEC. 363. The Attorney General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings.
>
> SEC. 366. Every attorney or counselor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such Department, as a special assistant to the Attorney General, or to some one of the district attorneys, as the nature of the appointment may require; and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law.

Under these provisions of law, there can be no doubt the Attorney General, and not the United States Attorney, is the appointive power and that plaintiff is bound by the terms of his appointment by the Attorney General. Plaintiff states that the letter of appointment by the Attorney General was not delivered to him, but the facts show that on the day the appointment was made the plaintiff was informed by the United States Attorney, upon advice received by him from the Attorney General, that he had been appointed and that his compensation had been fixed at the rate

of $4,000 per annum. After the appointment had been made plaintiff accepted the same and executed the required oath without protest and without investigation of any kind to determine whether or not the appointment by the Attorney General was upon the terms and conditions which plaintiff now alleges he had discussed with the United States Attorney. Even if it be assumed that plaintiff in his negotiations and conversations with the United States Attorney prior to his appointment expected that he would be paid upon a time basis if he was not sent to Greece, which the United States Attorney denies, such matters became merged in the definite appointment by the Attorney General on May 20 which plaintiff accepted on May 22, 1933. He was charged with constructive knowledge of its conditions. *Allen* v. *United States*, 41 C. Cls. 235, 238. Moreover, there can be no recovery on the basis of *quantum meruit* upon an implied contract for the reason that the lack of authority, statutory or otherwise, in the United States Attorney to make an express contract of employment and to fix the compensation of a special assistant to the United States Attorney is fatal to the theory of an implied contract. It is fundamental that he who is without authority to bind his principal by an express contract cannot be held to have done so by implication. *Beach* v. *United States*, 226 U. S. 243, 260; *The Curved Electrotype Plate Company* v. *United States*, 50 C. Cls. 258, 273; *Daly & Hannan Dredging Company* v. *United States*, 55 C. Cls. 1; *Willie Crockett Wright, Admrx.* v. *United States*, 86 C. Cls. 290.

Plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

ALUMINUM COMPANY OF AMERICA, A CORPORATION, v. THE UNITED STATES

[No. L-125. Decided January 8, 1940]

On the Proofs

Internal revenue tax; interest on overpayments wrongfully withheld.—In a suit for the recovery of overpayments in respect of an internal revenue tax, the fact that the Comptroller General wrongfully withheld payment of the refunds does not change the essential character of plaintiff's demands as regards computation of interest allowable. *Bonwit Teller & Co.* v. *United States*, 72 C. Cls. 559, cited.

Same.—The provisions of section 177 (b) of the Judicial Code, as amended, cannot be defeated by the fact that the Comptroller General wrongfully withheld payment of the determined overpayments.

Same.—The provisions of section 177 (b) of the Judicial Code, as amended, and of the act of March 3, 1875, as amended, are not in conflict and wherever applicable must be construed as having concurrent effect.

Same; counterclaim dismissed.—Parties having agreed that decision on counterclaim in another case shall be binding in the instant case, and decision in such other case (87 C. Cls. 96) was adverse to counterclaimant, it follows that such claim in the instant case must be dismissed.

The Reporter's statement of the case:

Mr. John G. Buchanan for the plaintiff. *Miller & Chevalier*, and *Smith, Buchanan, Scott & Ingersoll*, were on the briefs.

Mr. John W. Hussey, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the briefs.

The court made special findings of fact, as follows:

1. Plaintiff is now and at all times hereinafter mentioned has been a Pennsylvania corporation with its principal office in Pittsburgh.

2. On or about March 15, 1919, plaintiff filed a tentative income and profits tax return for 1918 and accompanied

such return by a payment of taxes in the amount of $2,267,-315.16. On or about June 16, 1919, plaintiff, on behalf of itself and corporations affiliated with it, filed a completed consolidated income and profits tax return for 1918 showing a total tax liability of $3,315,731.50. The difference between the total amount of taxes shown on this return and the amount paid March 15, 1919, was paid as follows:

June 16, 1919	$219,483.46
December 15, 1919	828,932.88

In the foregoing consolidated return plaintiff deducted $6,055,527.26 as an allowance for amortization of the cost of facilities constructed, erected, installed, or acquired by it or corporations affiliated with it on or after April 6, 1917, for the production or transportation of articles contributing to the prosecution of the war with the German government. That amount of $6,055,527.26 consisted of $45,096.31 deducted as amortization of the excess of the cost of property useful only as war facilities which had been permanently discarded, over the scrap or salvage value thereof, and $6,010,430.95, the portion of a total amount of $6,807,601.05 claimed as amortization for the years 1918 and 1919 of the cost of other war facilities which was apportioned to that part of the amortization period which fell within the year 1918. The latter amount constituted the maximum preliminary estimate by plaintiff of the amount of such amortization which, under the regulations promulgated by the Commissioner of Internal Revenue (hereinafter referred to as the Commissioner) and approved by the Secretary of the Treasury, might be deducted for the purpose of returns made in the year 1919, namely, 25 percent of the cost of such facilities.

3. March 15, 1921, plaintiff duly filed a claim for credit of $156,365.04, income and excess-profits taxes for 1918, against taxes for 1920 due on that date.

4. November 10, 1921, plaintiff's representatives filed with the Commissioner two volumes entitled "Schedule of Amortized Property—Aluminum Company of America, Pittsburgh, Pa." In these volumes a revised amortization cost was set up of $37,026,306.11 and a revised amortization

deduction of $18,124,339.28 instead of $6,852,697.36 (being the sum of $45,096.31 and $6,807,601.05, shown in finding 2), originally claimed for 1918 and 1919. November 15, 1921, plaintiff wrote the Commissioner as follows:

> We submit for your consideration revised claim for amortization of war facilities, affecting income and excess-profits tax returns for the taxable years 1918 and 1919. This claim covers the properties of this company and its affiliated companies included in the consolidated return. The claim consists of two volumes, delivered to you on November 10th by representatives of the Engineering Service Corporation, who have been retained by us to prepare an independent appraisal of the properties involved. The claim, based upon their findings, shows a total construction expenditure of $37,026,306.11, upon which amortization is calculated in the amount of $18,124,339.28; which figures are repeated herein for the purpose of identifying the volumes above referred to as delivered to you on the 10th.

This communication was delivered to the Commissioner's representative in Pittsburgh, Pa., on the same day and it was stamped received in the Bureau of Internal Revenue at Washington, D. C., November 21, 1921.

However, November 15, 1921, but prior to the receipt of the foregoing communication from plaintiff, the Commissioner advised plaintiff that the volumes referred to above had been filed in his office November 10, 1921, and that the case had already been assigned for field investigation by an appraisal engineer of the Amortization Section.

5. Upon consideration of the two volumes which had been submitted by plaintiff as shown in finding 4, the Commissioner on February 16, 1922, May 22, 1922, and June 16, 1922, furnished to plaintiff copies of the findings of the Amortization Section with respect thereto. Plaintiff incorporated these findings in a claim for refund of income and excess-profits taxes, based on such findings, for 1918, using Treasury Department Form 843, which it filed January 26, 1923. February 12, 1923, the Commissioner addressed a registered letter to plaintiff, which was duly received, in which he set out the results of an examination

of the returns of plaintiff and affiliated corporations for 1917, 1918, and 1919. The letter showed an overpayment by plaintiff of income and excess-profits taxes for 1918 of $808,-614.42. In the schedules attached to the letter the Commissioner made adjustments of income for 1918 called for by the findings of the Amortization Section, heretofore referred to, and made other adjustments on the grounds set out by plaintiff in its claim for credit filed March 15, 1921 (see finding 3), without which latter adjustments the amount of the overpayment determined by the Commissioner would have been less by $256,226.98. The remainder of the overpayment of $808,614.42, that is, $552,387.44, was due to the allowance by the Commissioner of additional deductions for amortization in accordance with the findings of the Amortization Section. Formal notice of the overpayment so determined by the Commissioner for 1918 in the amount of $808,614.42 was shown on certificate of overassessment No. 252602, which was delivered to plaintiff after the overpayment had been scheduled by the Commissioner. In the certificate of overassessment it was stated that in the determination of the overassessment the statements made in the claim for credit mentioned in finding 3 had been given careful consideration.

6. The overpayment for 1918 so determined by the Commissioner in the amount of $808,614.42, as set out in finding 5, was listed on a schedule of refunds and credits signed by the Commissioner April 15, 1924, by which he credited $252,763.05 of the overpayment against an additional assessment of income and profits taxes for 1917 which had been made against plaintiff on the Commissioner's March 1923 list, and further credited $19.40 and $729.44 of the overpayment against penalties assessed against plaintiff for failure to file certain returns of income of nonresident aliens, withheld at the source by plaintiff. The balance of the overpayment of $808,614.42, amounting to $555,-102.53, was allowed as a refund and was transferred to "Supplemental Direct Settlement Schedule IT–R–7806" and referred to the Comptroller General. May 21, 1924, plaintiff was notified by the Comptroller General that pay-

Reporter's Statement of the Case

ment of the amount of $555,102.53, which had been allowed as a refund, as set out above, would be withheld pending the determination of certain claims asserted by the United States against plaintiff. The aforementioned claims are the subject of a counterclaim in a case of this plaintiff against the United States, No. J–683, pending in this court and the same counterclaim is likewise pleaded in this suit.

7. The Commissioner having determined that plaintiff had overpaid transportation taxes in the amount of $26.40, which payment was made December 15, 1919, allowed a refund to plaintiff of that amount on schedule of refunds designated "Supplemental Schedule MTR–STR No. 750," signed May 12, 1924. August 12, 1924, plaintiff was notified by the Comptroller General that payment of the amount of $26.40 would be withheld pending the determination of claims asserted by the United States against plaintiff which are the subject of the counterclaim referred to in finding 6.

8. February 6, 1926, the Commissioner approved and signed a schedule of refunds designated "IT: CR–17197" allowing a refund of $729.44, the amount of a penalty assessed against plaintiff for failure to file certain returns of income of nonresident aliens withheld at the source by plaintiff, which was paid by credit as shown in finding 6, together with interest of $94.78 on the amount so paid by plaintiff, making a total of $824.22. April 6, 1926, the Commissioner forwarded the item of $824.22 to the General Accounting Office for settlement. Payment of that amount has been withheld by the Comptroller General pending the determination of certain claims asserted by the United States against plaintiff which are the subject of the counterclaim referred to in finding 5.

9. February 28, 1931, the Commissioner determined that plaintiff had overpaid its income and excess-profits taxes for 1918 in the amount of $246,917.85 in addition to the overpayment of $808,614.42 set forth above. No part of this amount of $246,917.85, or of any interest thereon, is claimed or involved in this suit.

10. July 2, 1931, plaintiff commenced an action at law against the United States in the United States District

Court for the Western District of Pennsylvania to recover certain income and profits taxes alleged to have been erroneously and illegally assessed and collected for 1918, together with interest thereon as provided by law. This action was begun as a result of the disallowance by the Commissioner on February 28, 1931, of a claim for refund which had been filed for 1918. The basis of the claim was that the Commissioner had improperly determined the costs to plaintiff and its subsidiaries of certain merchandise which entered into a determination of the net income of these companies for 1918. The claim amounted to $203,322.62. The District Court entered judgment in favor of the United States, and in so doing found certain facts which were agreed upon by the parties, one paragraph of which read as follows:

"The income and profits taxes of the plaintiff and corporations affiliated with it for 1918 were finally determined by the Commissioner of Internal Revenue to be $2,260,199.23. Overassessments aggregating $1,055,532.27, being the difference between the amount originally paid and the amount finally determined to be due, were allowed by the Commissioner and are not involved herein."

The judgment of the District Court was affirmed by the Circuit Court of Appeals for the Third Circuit (*Aluminum Company of America* v. *United States*, 67 Fed. (2d) 172), and certiorari was denied February 5, 1934, 291 U. S. 666.

11. Plaintiff has never received payment of any interest upon the overpayment of $808,614.42 referred to in finding 5, or any part thereof, except interest in the amount of $63,611.19 on September 9, 1931, which was computed as follows:

Overpayment	Division of amounts	From—	To—	Interest
$808, 614. 42	$256, 226. 98	9/15/21	4/15/24	$39, 715. 18
	552, 387. 44	7/26/23	4/15/24	23, 911. 57
				63, 626. 75
Less: Excess interest on 1919 refund of $729.44				15. 56
				63, 611. 19

12. Plaintiff has never received payment of the amounts of $555,102.53, $26.40, and $824.22 mentioned in findings 6, 7, and 8, respectively, or any part thereof or of any interest thereon except as hereinbefore shown.

The court decided that the plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover (1) $555,102.53, a portion of an overpayment of taxes for 1918 allowed by the Commissioner of Internal Revenue, and evidenced by a certificate of overassessment; and (2) $755.84, consisting of other miscellaneous amounts of tax overpayments allowed by the Commissioner, and likewise evidenced by certificates of overassessments.

Refund of these overpayments has not been made for the reason that the Comptroller General has withheld the total amount thereof for offset against an alleged indebtedness due the United States from plaintiff. This alleged indebtedness is the subject of a counterclaim pleaded against plaintiff in this suit in the sum of $1,540,473.57, with interest thereon, until paid. The same alleged indebtedness was likewise pleaded by the defendant as a counterclaim in suits Nos. J–683 and 42643 brought by plaintiff in this court. The parties have stipulated that the decision of the court in respect to the counterclaim in No. J–683 will be binding upon them in this case. Suit No. J–683 (*Aluminum Company of America* v. *United States*, 87 C. Cls. 96) has been decided by the court since the submission of this case. The counterclaim was rejected to the extent of $942,277.14, and judgment awarded plaintiff in the sum of $334,103.90. The counterclaim in No. J–683 having thus been decided adversely to the defendant, it follows that such claim in this suit must be dismissed.

With the counterclaim eliminated from the case the only controversy between the parties relates to the question as to how interest on the overpayments wrongfully withheld by the Comptroller General shall be computed. The plaintiff contends that interest should be computed under section 177 (b) of the Judicial Code, while the defendant contends

that it should be computed under the act of March 3, 1875, as amended.

Section 177 (b) of the Judicial Code, as amended by the Revenue Act of 1936 (49 Stat. 1648), reads:

> (b) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is hereby authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

The fact that the Comptroller General wrongfully withheld payment of the refunds does not change the essential character of plaintiff's demand. It is a suit for the recovery of overpayments in respect of an internal-revenue tax and the judgment of the court will be for overpayments in respect to an internal-revenue tax.

In *Bonwit Teller & Co.* v. *United States*, 72 C. Cls. 559, the taxpayer recovered an overpayment in respect of an internal-revenue tax as upon an account stated. In awarding interest on the overpayment in accordance with the provisions of section 177 (b) of the Judicial Code, as amended, the court said:

> The position of counsel for the defendant is that this cause of action cannot be regarded as a tax case but is one upon a contract, and in such case interest is denied by the Judicial Code, and that it matters not that the payment originally made to the defendant by the plaintiff was the payment of a tax. * * *
>
> In our opinion, plaintiff is entitled to judgment for $9,846.06, together with interest at 6 percent per annum from December 13, 1919, to a date preceding the

date of the Treasury check therefor by not more than thirty days, as provided in section 177 (b) of the Judicial Code, as amended by section 615 of the Revenue Act of 1928, 45 Stat. 877. The purpose of section 177 (b) of the Judicial Code as amended is, where it is necessary for a taxpayer to bring suit, to give him interest upon amounts erroneously collected as a tax from the date of its payment to a date preceding the date of the check therefor by not more than thirty days, to be determined by the Commissioner of Internal Revenue. The fact that the Commissioner of Internal Revenue may allow a claim for refund and then refuse to pay the same does not take the case out of the provisions of section 177 of the Judicial Code merely because the provision requiring that suit be brought within two years after the disallowance of a claim does not apply, and the taxpayer is held entitled to recover upon an account stated. The intent and purpose of the interest provision of the statute is to allow interest upon amounts erroneously or illegally collected as a tax during the time the government withholds the same from the taxpayer, and the fact that the suit to recover a tax so erroneously or illegally collected is grounded upon a determination of the Commissioner evidencing an account stated does not deprive the taxpayer of the interest expressly given by the statute. The Supreme Court did not say that the interest provision of section 177 (b) of the Judicial Code as amended did not apply, but only that the limitation clause requiring that suits be brought within two years after the disallowance of a claim for refund did not apply to a case where the Commissioner had determined that a tax had been erroneously collected and had allowed a claim for the refund thereof. The contention of the government that in any event the plaintiff is entitled to interest only to March 8, 1927, the date on which the Commissioner of Internal Revenue signed the first schedule of overassessments to the collector, is without merit. If this were a suit only for interest on a tax which the Commissioner had refunded, this contention would be correct. But here the Commissioner refused to refund the tax which had been erroneously and illegally collected and also refused to pay any interest thereon. The government has withheld the tax erroneously collected and has deprived the plaintiff of the use thereof, and under section 177 (b) of the Judicial Code, it cannot escape the payment of interest during the time the money was so wrongfully withheld.

The act of March 3, 1875, as amended (47 Stat. 1516), reads:

> When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff.

Plaintiff under this Act would be entitled to interest at 6 percent on the amount of the overpayment wrongfully withheld by the Comptroller General during the period of the withholding. As the Act has been construed, plaintiff's right to interest would run from May 21, 1924, the date of the withholding of the overpayment by the Comptroller General, to March 3, 1933. If applied to this case, that act would deprive plaintiff of interest from the date of the overpayment of the taxes, December 15, 1919, to the date of the withholding, and also to interest subsequent to March 3, 1933, to a date preceding the date of the refund check

by not more than 30 days, which plaintiff under the plain language of section 177 (b) of the Judicial Code, as amended, would be entitled to receive.

The two Acts are not in conflict and wherever applicable must be construed as having concurrent effect. Interest allowable in this case under the express provisions of section 177 (b) of the Judicial Code is greater than it would be under the act of March 3, 1875, as amended. The question presented for decision then is whether the provisions of the Judicial Code, as amended, are defeated by the fact that the Comptroller General wrongfully withheld payment of the determined overpayments. It is quite clear, we think, that they cannot be so defeated. The overpayments have not lost their status as an internal-revenue tax since they were allowed as a refund by the Commissioner of Internal Revenue on April 15, 1924, and under the authority of *Bonwit Teller* v. *United States*, *supra*, plaintiff is entitled to recover as a part of the judgment herein interest as provided in section 177 (b) of the Judicial Code, as amended.

The defendant bases its claim that interest on the overpayments withheld by the Comptroller General should be computed under the act of March 3, 1875, as amended, on *Helvetia Milk Condensing Co. Inc.* v. *United States*, 77 C. Cls. 743, and *Highland Milk Condensing Co.* v. *United States*, 77 C. Cls. 745. In these cases the court allowed interest under the act of March 3, 1875, as amended, upon a tax overpayment improperly withheld, from the date of the withholding to March 3, 1933. The question as to whether the act of March 3, 1875, as amended, operated to the exclusion of section 177 (b) of the Judicial Code in the computation of interest was not raised in these cases and was not considered or decided by the court. Had this question been raised we can have no doubt the court would have followed its decision in *Bonwit Teller* v. *United States*, *supra*, and would have held section 177 (b) of the Judicial Code applicable. However that may be, the point being now specifically raised, we hold that plaintiff is entitled to interest on the amount of its overpayment computed in accordance with section 177 (b) of the Judicial Code, as amended, rather than to interest computed under the provisions of the act of March 3, 1875, as amended.

Plaintiff is entitled to recover the amount of its overpayment of taxes for the year 1918 amounting to $555,858.37, together with interest from the date of the overpayment, December 15, 1919, to a date preceding the date of the check therefor by not more than thirty days to be determined by the Commissioner of Internal Revenue in accordance with section 177 (b) of the Judicial Code, as amended by the Revenue Act of 1936, giving due credit to the defendant for such interest as may have theretofore been paid or credited. Judgment is therefore awarded plaintiff in the sum of $555,858.37, with interest as provided by law. It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

LUKENS DREDGING & CONTRACTING CORPORATION v. THE UNITED STATES

[No. 43185. Decided January 8, 1940]

On the Proofs

Government contract; error in drawings or specifications.—Where the Government has misled a contractor in the drawings or specifications accompanying a contract, through error or misrepresentation, and as a result of this error or misrepresentation the contractor has to perform additional work, defendant is responsible and recovery can be had for the amount of extra work performed and no liquidated damages can be assessed under the terms of the contract.

The Reporter's statement of the case:

Mr. John W. Gaskins for the plaintiff. *King & King* were on the brief.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows, upon the stipulation entered into between the parties:

1. The plaintiff, Lukens Dredging & Contracting Corporation, a body corporate of the State of Maryland, under

date of January 18, 1933, entered into a contract with the United States, acting through the War Department, wherein for a consideration of $0.164 per cubic yard, unclassified, the plaintiff agreed to dredge approximately 342,000 cubic yards of material to provide an approach channel to the seaplane base at Dinner Key, near Miami, Florida. The contract allowed 150 days for the completion of the work.

2. On the basis of rock probings shown on a drawing prepared by defendant, which accompanied the invitation to bid and became a part of the contract, it was estimated that the amount of rock to be removed from within the contract limits would be 38,000 cubic yards. After dredging operations began the plaintiff encountered more rock than indicated on the drawing and so notified the contracting officer who caused a second survey of the area to be made. As a result of the second survey it was found that there were actually 67,401 cubic yards of rock within the contract limits. By reason of the excavation of such excess rock the work was not finished until 37 days after the contract completion date. Such delayed performance was due to unforeseeable causes beyond the control and without the fault or negligence of the plaintiff.

3. Because of the delay in the completion of the work, there was deducted by the defendant the sum of $1,850 from moneys otherwise due the plaintiff, representing liquidated damages for the 37 days' delay at the rate of $50.00 per day. This amount has not been repaid to plaintiff. The delay in completion was caused by dredging the excess amount of rock over that shown by the contract map from within the contract limits of the work.

4. The drawing prepared by defendant, Plaintiff's Exhibit No. 2, which accompanied the invitation to bid and set forth various rock probings, and which is made a part hereof by reference, did not in fact, through error, contain all of the rock probings that had been made by the defendant at the time the drawing was prepared. Had all of said probings been shown on the drawing they would have indicated the existence of an additional 5,703 yards of rock over the amount of rock shown on the drawing. The cost to plaintiff of removing the 5,703 additional yards of rock, over and

above the contract price for unclassified material, was $0.272 per yard, or $1,551.22.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The facts in this case have been stipulated by the parties.

Plaintiff entered into a contract with the defendant on January 18, 1933, through the War Department, to dredge a channel at a unit price per cubic yard of material so as to provide an approach channel to the seaplane base at Dinner Key, near Miami, Florida. The work was to be completed within 150 calendar days.

Upon the basis of the amount of rock shown on the drawings prepared by the defendant, which accompanied the invitations to bid and which were a part of the contract, the rock to be removed was estimated to be 38,000 cubic yards. After the work had been commenced it was discovered that an error had been made by the defendant in the drawing prepared by it and, as a result of this error, the plaintiff was required to remove 5,703 cubic yards of rock over the amount shown on the drawing. It is admitted that the extra cost for removing this additional amount of rock was $1,551.22. It is also admitted that due to the extra amount of rock which had to be excavated plaintiff used 37 days in excess of that fixed in the contract to complete the work and was assessed liquidated damages at the rate of $50.00 per day, a total of $1,850.00.

Where the defendant has misled a contractor in the drawings or specifications accompanying a contract, through error or misrepresentation, and as a result of this error or misrepresentation the contractor has to perform additional work, defendant is responsible and recovery can be had for the amount of extra work performed and no liquidated damages can be assessed under the terms of the contract.

Plaintiff is entitled to recover the sum of $3,401.22. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

THE ALUMINUM COOKING UTENSIL COMPANY, A CORPORATION v. THE UNITED STATES

[No. 42621. Decided January 8, 1940]

On the Proofs

Interest on amounts withheld by the Government.—Decided on the authority of *Aluminum Company of America* v. *The United States*, No. J–638, 87 C. Cls. 96.

The Reporter's statement of the case:

Mr. A. W. Gregg for the plaintiff. *Mr. John W. Fisher* and *Smith, Buchanan & Ingersoll* were on the briefs.

Mr. J. Robert Anderson, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows, upon a stipulation of the facts and the evidence:

1. The plaintiff pursuant to contracts, and the defendant's orders, from March 29, 1928, to June 30, 1928, both inclusive, sold and delivered to the defendant various articles made of aluminum, amounting in all to $842.18.

2. The various articles so sold and delivered were in each instance passed and accepted by the bureau, office, or agency, of the defendant concerned, and the several amounts involved have been allowed by the General Accounting Office of the United States as the correct amounts chargeable in favor of the plaintiff and against the defendant.

3. Plaintiff has not received payment of the said amounts or any part thereof for the reason that on July 23, 1928, and August 17, 1928, the General Accounting Office set off against plaintiff's account an alleged indebtedness to the United States of the Aluminum Company of America, of which plaintiff herein was a wholly owned subsidiary. The alleged indebtedness of the Aluminum Company of America to the defendant was pleaded in a counterclaim in a suit pending in this court in the case of *Aluminum Company of America* v. *United States, No. J–683*, and was there decided

adversely to the defendant. (*Aluminum Company of America* v. *United States*, 87 Ct. Cls. 96.)

4. It has been stipulated by the parties that if plaintiff is entitled to interest from the dates of settlements of plaintiff's accounts by the General Accounting Office to March 3, 1933, the correct amount of such interest is $232.19.

The court decided that the plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The facts are fully disclosed and set out in our Findings and need not be restated. The defendant concedes that the plaintiff is entitled to recover the principal sum claimed in suit, $842.18.

It was determined in *Aluminum Company of America* v. *United States*, 87 C. Cls. 96, that that company was not indebted to the United States in the amount pleaded in a counterclaim therein, or in any amount whatever, but that the United States on the contrary was indebted to the plaintiff therein, the Aluminum Company of America. Therefore the withholding of the amounts admittedly due plaintiff in this case to offset the nonexisting but alleged indebtedness of the Aluminum Company of America to the defendant was wrongful and entitles the plaintiff, under the provisions of the act of March 3, 1875, as amended by the act of March 3, 1933 (47 Stat. 1489), to interest at the rate of 6 percent from the date of such wrongful withholding to March 3, 1933, which has been stipulated by the parties to be $232.19.

Plaintiff is therefore entitled to recover the sum of $1,074.37 and judgment in that amount is hereby awarded. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

NORTH PACIFIC GRAIN GROWERS, INC., A CORPORATION, v. THE UNITED STATES

[No. 43487. Decided January 8, 1940]

On the Proofs

Government obligation to reimburse for grain withheld from market during stabilization operations.—Plaintiff alleges that there was an agreement or understanding between itself and the Federal Farm Board, a Government agency, that the Government would protect plaintiff from any loss by reason of withholding grain from the market during stabilization operations of the Federal Farm Board on the 1930 crop, but it is held that the facts do not show any legal or equitable obligation on the part of the United States to reimburse the plaintiff for its losses.

Same; "moral obligation."—The question of "moral obligation" upon the part of the Government to make reimbursement is not within the province or jurisdiction of a court which is established to determine questions of fact and the law applicable thereto but is a matter for Congress to determine.

The Reporter's statement of the case:

Mr. Dona B. Heil for the plaintiff. *Mr. Ben S. Fisher* was on the briefs.

Mr. John B. Miller, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Public Resolution No. 134, 74th Congress (S. J. Res. 38), approved by the President on June 26, 1936, 49 Stat. 1983, reads as follows:

JOINT RESOLUTION

To provide for an inquiry by the Court of Claims with respect to losses sustained by cooperative marketing associations in connection with stabilization activities in grain

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Court of Claims, in accordance with such rules as it may adopt, shall investigate losses sustained dur-

ing the stabilization operations of the Federal Farm Board in 1929 and 1930, by cooperative associations to which loans were made, either directly or indirectly, by the Federal Farm Board, through withholding grain from the market and making advances to their members in order to stabilize prices, for the purpose of determining—

(1) The amount of loss, if any, in the case of each such association and the facts and circumstances relating to such loss; and

(2) Whether, because of any agreement or understanding between such associations, or any of them, and the Federal Farm Board (or any member, officer, or employee thereof) or because of any other facts or circumstances, there is any legal, equitable, or moral obligation on the part of the United States to reimburse such associations, or any of them, for the whole or any part of any such loss.

The court shall report to Congress, at the earliest practicable date, the results of its investigation and determinations, together with such recommendations as it deems appropriate.

2. The position of plaintiff in this suit is that plaintiff sustained losses during the stabilization operations of the Federal Farm Board in 1930 and 1931 through withholding wheat from the market and making advances to its farmer members in order to stabilize wheat prices, such losses being the difference between the loans made to its farmer members prior to October 1, 1930, and the price received for the wheat on which it made such loans, and that the defendant is under obligation to reimburse the plaintiff for such losses in the amount of $102,622.77.

3. During the times herein mentioned, plaintiff was and is now a nonprofit cooperative corporation duly organized under the laws of the State of Delaware for the purpose of pooling, storing, and marketing wheat produced by its farmer members in an orderly manner in order to eliminate speculation and waste, and having Spokane, Washington, as its principal place of business.

Plaintiff also was and is now a cooperative corporation within the meaning of an Act of Congress approved February 18, 1922 (42 Stat. 388), entitled an "Act to Authorize Associations of Producers of Agricultural Products," known as the Capper-Volstead Act and within the meaning of an

Act of Congress approved June 15, 1929 (46 Stat. 11), entitled the "Agricultural Marketing Act," intended "to promote the effective merchandising of agricultural commodities in Interstate and Foreign Commerce, and to place agriculture on a basis of economic equality with other industries."

4. The Agricultural Marketing Act provided for the Federal Farm Board consisting of nine members, eight of whom were appointed by the President and confirmed by the Senate, and the Secretary of Agriculture was ex officio the ninth member. This Board was organized on July 15, 1929, with Alexander Legge as Chairman, and Samuel R. McKelvie was designated as the member in charge of grain. The act made available to the Farm Board a revolving fund of $500,000,000 and loans from this revolving fund were thereafter made to plaintiff and to other cooperatives for the purpose of carrying out the policy of Congress as declared in the act.

5. One of the main purposes of the Agricultural Marketing Act was to develop and encourage a nation-wide system of cooperative marketing for the purpose of controlling the movement of wheat to the central markets, thereby preventing surpluses on the market and to establish a stabilized price for wheat during the marketing season.

To accomplish this purpose, the Farm Board invited representatives of the cooperative organizations then in existence to a conference in Chicago on July 29, 1929, to consider the creation of a national marketing agency to serve all the wheat-growing areas of the United States. At this conference a committee from the various cooperatives was selected to work out the details of such an agency, which resulted in the incorporation of the Farmers National Grain Corporation under the laws of the State of Delaware on October 29, 1929, with its principal office in Chicago, Illinois. All the stock of this corporation was held by so-called "regional" cooperatives, some twenty-five in number, located at various centers in the wheat-growing areas. All the stock in the "regionals" was owned by so-called "local" cooperatives situated within the area served by the "regional." The locals in turn were owned by farmer members. This organization set-up was intended to make avail-

able to the wheat growers through the Federal Farm Board the financial and other beneficial provisions of the Agricultural Marketing Act.

6. During the fall of 1929 a financial panic of major proportions swept over the United States affecting particularly the market for corporate stocks and bonds and for grains. With the outbreak of the panic, the market value of wheat declined drastically. At a meeting in Chicago, Illinois, on October 26, 1929, the Farm Board offered to make loans to the cooperatives from which they could make further advances or loans to their farmer members on the basis of a value of $1.13 per bushel No. 1 Western White at Seattle and Portland, and different values at other central markets, which values were the market values of that day and were considerably lower than the market values of like grades of wheat before the commencement of the panic. This action of the Farm Board stabilized the prices of wheat at the fixed loan prices for several months. At times during November and December the market prices were higher than the loan prices. At the beginning of the year of 1930 the prices of wheat began to decline again and the Farm Board on February 10, 1930, organized the Grain Stabilization Corporation pursuant to the power given it under the Agricultural Marketing Act. This corporation immediately began to purchase wheat from all sources at the fixed loan prices, which for the Pacific Northwest was $1.13 per bushel for No. 1 Western White. Pursuant to an understanding with the cooperatives to which it had made loans, the Farm Board through the Grain Stabilization Corporation took over all wheat such cooperatives had on hand in June 1930 at the fixed loan prices, which were higher at the time than the market prices. The loss was borne by the revolving fund made available to the Farm Board by the Agricultural Marketing Act.

By this policy of the Farm Board on the 1929 crop, the profits of the wheat marketed when the market prices were higher than the loan prices went to the cooperatives for their members; and the losses from the wheat taken over by the Grain Stabilization Corporation when the market prices were lower than the loan prices were assumed by the Farm Board.

7. Plaintiff was organized in November 1929 and began to do business April 1, 1930, and its operations embraced portions of the states of Washington, Oregon, Idaho, and Montana. It had in its organization 55 to 60 local cooperatives and these cooperatives had a total of about 5,500 farmer members. From April 1 to June 30, 1930, plaintiff handled 7,000,000 bushels of wheat of the 1929 crop out of a total of 80,000,000 bushels of wheat produced in that area. All the wheat handled by plaintiff was turned over to the Grain Stabilization Corporation before the end of June 1930 at the fixed loan price at Seattle and Portland.

8. Early in June 1930 the Farm Board announced that there would be no stabilizing of wheat prices through the Grain Stabilization Corporation after June 30, 1930, and of which plaintiff had knowledge at the time.

9. Plaintiff began to receive wheat from the 1930 crop the latter part of July 1930. As wheat was delivered, plaintiff advanced to the farmer members 75% of the current net market value of the wheat at its location from moneys borrowed from the Federal Intermediate Credit Bank of Spokane.

At the time the farmer delivered his wheat to the local association, he executed an application for a loan containing the following provisions:

> It is understood and agreed by the applicant that this application and the collateral pledged hereunder may be assigned to the North Pacific Grain Growers, Inc.
>
> The applicant further agrees that should the market value of the commodity pledged hereunder depreciate to such an extent that the Local herein mentioned and/or the North Pacific Grain Growers, Inc., deem themselves insecure the applicant will upon demand forthwith deposit sufficient cash, warehouse receipts, or other documents of title to restore the margin as may be required by the Local and/or the North Pacific Grain Growers, Inc. Should the applicant fail to meet such demand for additional Collateral the Local and/or the North Pacific Grain Growers, Inc., is authorized to cause the said wheat to be transferred to its own account or to be disposed of at public or private sale with or without notice prior tender to the applicant.
>
> It is further understood and agreed that the Local or the North Pacific Grain Growers, Inc., is authorized to

> loan or pledge said wheat either separately or together with other wheat without reference to the specific amount borrowed against it by the applicant and/or by the "Local", all as set out in the terms of the Standard Marketing Agreement or Agreements heretofore executed by the applicant and/or by the Local, said agreements being specifically referred to and made a part hereof.

The applications with warehouse receipts were sent by the local to the plaintiff and by plaintiff pledged to the Intermediate Credit Bank. Such receipts were endorsed by the farmer, the local, and by plaintiff and by plaintiff deposited with the bank as collateral or security for the loan from which plaintiff made loans to the farmers.

10. In September 1930, after loans had been made on that part of the wheat delivered up to that time on the basis set forth in the preceding finding, there was a sharp decline in the market price of wheat and plaintiff's margins at the Intermediate Credit Bank became impaired.

On September 27, 1930, F. J. Wilmer, President of plaintiff, sent the following telegram to the Farmers' National Grain Corporation in Chicago:

> Price declines wiping out margins of member loans at Intermediate Credit Bank many borrowers unable to protect loans must sell them out unless Farm Board agencies can assist us Stop Drastic action will demoralize our wheat market and cause great distress to members commercial houses and banks.

This presented an alarming situation and Mr. Huff and Mr. Milnor, the chief officers of both the Farmers' National Grain Corporation and the Grain Stabilization Corporation, went to Washington to confer with the Farm Board on the subject of protecting the wheat loans of plaintiff.

On September 29, 1930, plaintiff sent to Mr. Huff, care of the Farm Board, Washington, the following telegram:

> Do utmost to save growers from being sold out. Such drastic action will utterly destroy some locals, and cause irreparable injury to the Cooperative movement. Businessmen understand the literal obligation of contracts, but average farmer will see nothing but injustice if sold out. Earnestly hope that you are successful.

Reporter's Statement of the Case

On September 30, 1930, plaintiff sent to Chairman Legge of the Farm Board the following telegram:

> Situation critical Growers face forced sale collateralled wheat. Such misfortune would nearly destroy us Stop Has not emergency come for stabilization measures.

Messrs. Huff and Milnor conferred with members of the Farm Board, including Chairman Legge and Mr. McKelvie. As a result of the conferences and carefully considering the critical situation in which plaintiff found itself, the members of the Farm Board directed Mr. McKelvie to send the following telegram, which was received by plaintiff October 1, 1930:

> Re your wire Chairman Legge Farmers National Grain corporation will protect margins on primary loans of its members using funds of Federal Farm Board stop What other steps may be taken cannot say just now.

Other telegrams were exchanged at the time to ascertain the amount of plaintiff's borrowings.

11. Upon receipt of the McKelvie telegram, an officer of plaintiff in a statement to the press, which was published that day in Spokane, said that the Farm Board's assurance that margins would be protected amounted virtually to "pegging the price at the present market." This statement was the same day called to the attention of Chairman Legge who immediately issued a press release, which was published on the same day in the Spokane papers, in which he stated "that the Federal Farm Board was making supplemental loans on grain against which cooperatives had already secured primary loans" and denied that the Board contemplated establishing any "peg price or other fixed price for grain." On October 2, 1930, the Farmers' National Grain Corporation advised plaintiff by telegram that the McKelvie telegram does not even suggest a fixed price or a pegged-loan policy.

As a result of the happenings referred to in this and the preceding findings, the plaintiff, in order to aid the Farm Board to relieve the situation and to stabilize the wheat prices and in the hope of obtaining a higher price for its

wheat, did not market any wheat until June 1931. During all the period involved the Farm Board, acting for the benefit of the wheat growers of the country generally, was endeavoring to prevent a decline in the market price of wheat.

12. The effect of the McKelvie telegram offering the use of the funds of the Federal Farm Board to protect margins on primary loans was to strengthen the market price of wheat and for a short time caused a rise in the market price of wheat. This prevented a forced sale of the wheat of plaintiff and other cooperatives similarly situated.

On October 17, 1930, the Farmers' National Grain Corporation sent a circular letter signed by C. E. Huff, President, to all of its stockholders, including plaintiff, in which attention was called to the situation making necessary the margining of loans on wheat which had been carried in storage and expressing the hope that the market would not again decline to a point where such action would be necessary, but giving assurance that if it should again become necessary and it could be done without assuming an actual loss, the Farmers' National Grain Corporation stood ready to act promptly and decisively.

On October 30, 1930, the Farmers' National Grain Corporation sent a letter to plaintiff in which were copies of a supplemental loan agreement. Plaintiff executed this agreement in a modified form on January 2, 1931, and thereon obtained a loan of $335,000 which was paid over to the Intermediate Credit Bank on January 24, 1931, to protect the margin on plaintiff's primary loans.

13. On October 1, 1930, wheat was quoted in Chicago at $0.83 a bushel. By the end of that month wheat was quoted in Chicago at $0.87 a bushel. Beginning in November, wheat began to decline in price and by the middle of the month it was selling for $0.73 per bushel. Other central markets were confronted with similar situations. The Farm Board then determined on stabilizing operations through the Grain Stabilization Corporation which was commenced in Chicago on the 15th of November and within a short time thereafter the wheat price there was stabilized at $0.83 per bushel and was maintained on that basis with slight variations until June 30, 1931. On December 17,

1930, similar stabilizing operations were commenced for the Pacific Northwest and wheat was there stabilized at $0.68 per bushel and was maintained on that basis with slight variations until June 30, 1931. Plaintiff sold all of its wheat from the 1930 crop to the Grain Stabilization Corporation in June 1931 at the stabilized price. The price thus obtained was in many instances less than the amount of loans obtained by the farmers on their wheat prior to October 1, 1930, and the losses so sustained is the basis of plaintiff's claim in this suit.

14. By January 1931 it became apparent to plaintiff that the price of wheat would not go high enough to save it from losses on loans made to its members prior to October 1, 1930, and it sought assurance from the Farm Board and the Farmers National Grain Corporation to reimburse plaintiff for any such losses; and plaintiff based its claim for such assurance chiefly on the policies of the Farm Board in handling the 1929 wheat crop, referred to in finding 6, and the circumstances under which the McKelvie telegram was sent to plaintiff. The assurance sought by plaintiff to be reimbursed for the losses was not forthcoming from the Farm Board or the Farmers National Grain Corporation.

15. On March 2, 1931, plaintiff sent a letter to its locals, in which it offered to each local a renewal on loans on which the market value of wheat was less than the amount loaned provided that each farm member, to whom an overloan had been made, paid in an amount sufficient to reduce his loan down to the market value of his wheat. As a result of this letter, there were some collections made on overloan accounts. This procedure caused so much dissatisfaction among the members that further attempts to collect were discontinued and later those members from whom collections had been made were given credit for the amount so paid.

16. On February 13, 1932, the Board of Directors of plaintiff adopted a resolution which reads as follows:

> *It is therefore resolved*, that the Manager and Secretary are directed to make an adjustment of the overloan claims held against Locals or grower members, upon the principle that, in view of the representations made by

> the Federal Farm Board and Farmers National Grain Corporation in the fall of 1930, that the liability for such overloans are chargeable to the Farmers National Grain Corporation, the Grain Stabilization Corporation, and the Federal Farm Board and not to the Locals, or their grower members. That if the said Local Associations will assign to the North Pacific Grain Growers, Inc., any and all of their claims and will further in any manner they may be called upon, render assistance to the North Pacific Grain Growers, Inc., in pressing its claim for the aforesaid overloans against the Farmers National Grain Corporation and Federal Farm Board, the North Pacific Grain Growers, Inc., in consideration therefor will release said Local association and grower members from any specific claim on account of overloans or advances made by reason of the matters hereinbefore stated.

Thereafter the indebtedness due from growers to the plaintiff because of the overloans in question was credited to each of them respectively on plaintiff's books and such growers are not now in any way indebted to the plaintiff, and plaintiff is not holding them liable for such overloans.

17. On September 17, 1931, in a conference in Chicago between two of the officers of plaintiff and the president and other officers of the Grain Stabilization Corporation a memorandum was drawn up, which contained the agreement reached by said officers that any loss by plaintiff incurred between October 1 and December 17, 1930, arising from overloans, should be borne by the Federal Farm Board or the Grain Stabilization Corporation. The memorandum also contained a formula for the computation of the loss. When this memorandum was submitted to the president of the Grain Stabilization Corporation for his signature, he refused to sign it until he could get the consent of the Farm Board. Such consent was not obtained and the memorandum was not signed.

Plaintiff continued to press its overloan claims, which continued to receive sympathetic consideration from officers of the Farmers National Grain Corporation and the Grain Stabilization Corporation. On April 19, 1932, the president of the former corporation wrote a letter to the plaintiff, in which he expressed regret with the "attitude of the Farm

Board relative to loans," and stated, "I still believe that your losses on loans in the fall of 1930 should have been absorbed by the Farm Board."

18. On August 17, 1932, the Board of Directors of the Farmers National Grain Corporation had a meeting, at which plaintiff's overloan claims were considered. The Board adopted resolutions proposing a settlement of the claims. The Board had made goodwill payments to a number of the regionals. Plaintiff had made advances to its locals to aid them in the purchase or erection of facilities. Beginning with the 1931 crop, the locals of plaintiff made deliveries of wheat directly to the Farmers National Grain Corporation, whereas, theretofore, deliveries of wheat, by the locals, with a few exceptions, were made through plaintiff. The said resolutions proposed a goodwill payment to plaintiff of $25,000 (Farmers National then held a note against plaintiff for $25,000), to re-discount for plaintiff the facility loans in the amount of $43,000, and for special services rendered by the locals to pay ⅛ of one cent per bushel to each local for each bushel of wheat handled from the 1932 crop. The resolutions contained the following paragraph:

> Be it further resolved, that the action contemplated in these resolutions be taken only upon receipt from North Pacific Grain Growers, Inc., of a resolution of its Board of Directors, binding said North Pacific Grain Growers, Inc., to acceptance of these proposals, and by such acceptance binding North Pacific Grain Growers, Inc., never to bring legal action against this Corporation, its subsidiaries or affiliates, The Grain Stabilization Corporation and/or the Federal Farm Board on said alleged claim hereinabove referred to.

19. On August 29, 1932, the Board of Directors of plaintiff held a meeting at which the resolutions referred to in the preceding finding were considered. The action of the Board at this meeting on the said resolutions is recorded in the minutes of the meeting. The minutes show that the proposals referred to in the preceding finding were considered and that the following action was taken thereon:

> * * * upon the understanding that the $25,000.00 heretofore received from the Farmers National Grain Corporation, was being offered as equalizing the position

of the North Pacific Grain Growers, Inc., with other Regional members of the National which have heretofore received payments for good will, that the said $25,000.00, together with the offer of the Farmers National Grain Corporation to take over the facility loans upon which the North Pacific Grain Growers, Inc., has advanced its own funds, and the further agreement of the National to pay for the current year, one-eighth of a cent per bushel on member wheat direct to the Locals, in addition to the amount already prescribed as commissions as stated in contract now in force, be so accepted and the Treasurer is directed to so notify the National and ask for the return of its note.

20. The action of plaintiff on August 29, 1932, referred to in finding 19, was not a specific acceptance of the proposals in the resolutions of the Farmers National on August 17, 1932, referred to in finding 18. On September 13, 1932, the treasurer of the Farmers National wrote a letter to the plaintiff calling attention to the resolutions of August 17, 1932, and stating that before payment could be made plaintiff should adopt resolutions reciting in detail the proposals of the Farmers National and plaintiff's acceptance of the proposals. The controversy was carried on by telephone, and on October 28, 1932, the Farmers National wrote a letter to plaintiff, which indicated that the action of plaintiff on August 29, 1932, was satisfactory.

Thereafter as a goodwill payment plaintiff's note for $25,000 was cancelled, and the Farmers National took over the facility loans in the amount of $43,000 and paid to the locals an additional 1/8 of one cent per bushel for the wheat handled by them from the 1932 crop.

21. The difference between the amount loaned on wheat to the farmers before October 1, 1930, and the amount realized from the sales of that wheat is $102,622.77. In this difference of $102,622.77 is included $13,516.25, the difference between loans on and sales of wheat of farmers belonging to two Idaho locals—Boise Valley Grain Growers and Snake River Grain Growers. Because of the location of these two locals, they dealt directly with the Farmers National Grain Corporation and not through plaintiff. Their loans were not obtained through plaintiff, and plaintiff did not endorse

their notes or become liable thereon. The net amount of losses sustained by the plaintiff during the stabilization operations of the Federal Farm Board in 1929 and 1930 through withholding grain from the market, or making advances to members in order to stabilize prices, was $89,-106.52.

DEFENDANT'S COUNTERCLAIM

22. Defendant has filed a counterclaim on four promissory notes executed by the plaintiff, each set out in a separate count, and the parties stipulate as follows:

(*a*) That the principal and interest due on the promissory note set forth in defendant's first counterclaim have been paid in full, and that there is now nothing due and owing on that account to defendant.

(*b*) That there remains unpaid on account of principal on the promissory note set forth in defendant's second counterclaim the sum of $18,960.00, and that interest is due thereon from December 31, 1936, but that plaintiff is entitled to a credit of 76 cents on account of the interest which has accrued since December 31, 1936.

(*c*) That there remains unpaid on account of principal on the promissory note set forth in defendant's third counterclaim the sum of $62,619.61, and that interest on said note has been paid to and including September 30, 1939.

(*d*) That there remains unpaid on account of principal on the promissory note set forth in defendant's fourth counterclaim the sum of $15,616.05, and that interest on said note has been paid to and including September 30, 1939.

GREEN, *Judge*, delivered the opinion of the court:

This case has been referred to us by a joint resolution of Congress. The plaintiff is a cooperative association organized for the purpose of marketing wheat produced by its farmer members and to which loans were made by the Federal Farm Board. It alleges that it lost $102,622.77 through withholding the grain of the 1930 crop from the market on which it had made advances to its members in the form of loans on their grain in order to stabilize prices, this being the difference between the amount loaned by plain-

tiff to its members and the amount received from the sale of grain upon which these loans were made. The findings show that the plaintiff lost $89,106.52 by withholding grain from the market during the stabilization operations of the Board.

The plaintiff alleges that there was an agreement or understanding between it and the Federal Farm Board, acting through Samuel R. McKelvie, a member of the Board, that the defendant would protect plaintiff from any loss by reason of withholding grain from the market during stabilization operations of the Federal Farm Board on the 1930 crop by protecting its margins on loans by plaintiff to its members, but the testimony does not sustain this allegation. The evidence as a whole shows that during the period involved the Farm Board, acting through the Stabilization Corporation, in the interest of the wheat growers of the country generally, was endeavoring to prevent a decline in the market price of wheat and that its efforts had a beneficial result.

We think the findings show the facts in the case so clearly as to make unnecessary any repetition or further discussion thereof. We are required to investigate and report to Congress whether there is any legal or equitable obligation on the part of the United States to reimburse the plaintiff for the whole or any part of such loss. In *Tillson* v. *United States*, 100 U. S. 43, the Supreme Court in a similar case said:

> To our minds the word "equitably," as here used, means no more than that the rules of law applicable to the case shall be construed liberally in favor of the claimants.

Even when the law is construed "liberally in favor of the claimants" it is evident that the facts do not show any legal or equitable obligation on the part of the United States to reimburse the plaintiff for its losses. The resolution, however, goes farther and includes in the scope of the investigation a "moral obligation." We have included in the findings of fact such matters as we consider might bear upon the question of whether there was a moral obligation, but we do not think the determination of this question comes within the province or jurisdiction of a court which is established

to determine questions of fact and the law as applicable thereto. We therefore express no opinion on that point which is a matter for Congress itself to determine.

As this is not a suit in which a judgment can be rendered, we have merely included the facts with reference to the counterclaim in the findings.

Pursuant to the resolution, the findings of fact and conclusions of the court upon the legal questions as shown above will be reported to Congress.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

KEINER-WILLIAMS STAMPING COMPANY v. THE UNITED STATES

[No. 43133. Decided January 8, 1940]

On the Proofs

Income tax; deduction for depreciation.—Where taxpayer kept no inventory, and charged to expense all dies and patterns, and was unable to testify as to the cost thereof, and did not know the number on hand on March 1, 1913, nor at any other time; nor how long those on hand on March 1, 1913, had been in use; and made only an estimate, unsupported by evidence, as to such valuations as of March 1, 1913, it is held that plaintiff, upon such inadequacy of proof, could not establish a claim for deduction for depreciation in arriving at a proper income tax return for the fiscal year ending July 31, 1922.

The Reporter's statement of the case:

Mr. D. F. Prince for the plaintiff. *Mr. George E. H. Goodner* was on the brief.

Mr. D. F. Hickey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized under the laws of New York, with principal office at Richmond Hill, Long Island, New York. It is engaged in the manufacture of milk cans, soda water tanks, and other sheet-metal containers.

2. Plaintiff filed its income tax return for the fiscal year ending July 31, 1922, and paid the taxes assessed thereon, together with interest. The dates and amounts are as follows:

Date	Tax	Interest
October 13, 1922	$3,047.83	
September 9, 1926	1,025.46	$188.43
May 17, 1930	9,143.46	
May 19, 1930		3,885.97
Total	$13,216.75	$4,074.40

The interest paid on May 19, 1930, was the interest assessed on the tax paid on May 17, 1930.

3. On September 6, 1932, plaintiff filed its refund claim, in which it demanded a refund of $13,029.43 of the taxes and interest so paid for the fiscal year ending July 31, 1922. One of the grounds set forth by plaintiff in the said claim for refund was that it was entitled to an additional depreciation deduction based on dies and patterns used in its business.

The Commissioner of Internal Revenue considered the claim and determined the net income to be $86,465.92, the invested capital to be $624,328.66, and the total tax liability to be $13,066.84. Thereupon the Commissioner on August 26, 1933, refunded to plaintiff, the sum of $149.91, together with interest thereon in the amount of $30.06.

On September 21, 1933, the Commissioner notified plaintiff that its refund claim was rejected as of that date, except as to the said refund of $149.91. Thereafter the Commissioner refunded to plaintiff $5.89 of the interest theretofore paid by plaintiff on September 9, 1926.

4. Due to an error in computation of plaintiff's tax liability, the Commissioner of Internal Revenue on August 30,

1935, again considered said claim and issued a certificate of overassessment for the sum of $645.31, of the said taxes theretofore paid. In arriving at said overassessment, the Commissioner did not change his figures as to the income or invested capital from those he had theretofore determined in arriving at his former overassessment. He thereupon paid to plaintiff the sum of $1,030.15 in one Treasury check, which amount was made up as follows:

Overpayment of tax	$645.31
Interest on said overpayment	207.13
Interest paid by plaintiff September 9, 1926	134.53
Interest on said amount of $134.53	43.18
Total	$1,030.15

5. The Commissioner of Internal Revenue in arriving at the said income of $86,465.92, allowed plaintiff a total depreciation deduction of $18,234.23. It was all on machinery and equipment, brick building, furniture and fixtures, and automobiles. No part of said allowance was for depreciation of dies and patterns.

6. On March 1, 1913, plaintiff owned and used in its business dies and patterns, some of which had been acquired in 1907 and others at various dates between that and March 1, 1913. There was no account on plaintiff's books representing the cost of said dies and patterns as of March 1, 1913, or as of any other date, and there was no inventory thereof on March 1, 1913, or on any other date. However, they were essential to the conduct of plaintiff's business.

A substantial amount of those on hand on March 1, 1913, were on hand and in use during the fiscal year ending July 31, 1922, but the exact amount thereof was not proven nor was it ascertainable from plaintiff's records.

7. Plaintiff's invested capital on January 1, 1913, was $96,190.14, and on July 1, 1921, was $680,887.51. All of this increase resulted from earnings. None of it represented dies and patterns, because their cost had in each instance been charged by plaintiff to expense and had never since been capitalized.

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From the end of 1912 to July 31, 1922, plaintiff's total earnings were $1,262,000.00.

8. No evidence was introduced which is sufficient on which to make a finding of the value of the dies and patterns on hand and in use on March 1, 1913.

9. Plaintiff is the sole owner of the claim here asserted and it has neither sold nor assigned any part thereof to any other person or persons.

The court decided that the plaintiff was not entitled to recover.

OPINION PER CURIAM: The claim here asserted is based on the plaintiff's right to deduct depreciation on patterns and dies on hand as of March 1, 1913. However, plaintiff's evidence as to the quantity or the value of the dies and patterns on hand on March 1, 1913, is insufficient on which to base a finding and, therefore, the amount of depreciation to which it is entitled cannot be determined.

Plaintiff charged all dies and patterns to expense, and it was unable to testify as to the cost thereof. It kept no inventory and did not know the number on hand on March 1, 1913, nor at any other time, nor did it know how long those on hand on March 1, 1913, had been in use. It makes an estimate of the value of those on hand on March 1, 1913, of $100,000, but it supports this estimate in no way other than to say that they must have been worth so much on account of the amount of the earnings of the business. It also says that it thinks it would have cost as much money to reproduce them, but evidently this was an estimate, and unsupported by any facts. Because of this inadequacy of the proof, the Commissioner properly disallowed plaintiff's claim.

On this state of the record it is impossible for the court to determine with any certainty what the value really was, and on account of this insufficiency of the proof plaintiff's petition must be dismissed. It is so ordered.

ALFRED PAGE v. THE UNITED STATES

[No. 43566. Decided January 8, 1940]

On the Proofs

Fraudulent entry on coal lands.—Certificate of entry on coal land in Alaska having been obtained by fraud on the Government, as established by the evidence, and plaintiff having also entered into a conspiracy with others to defraud the Government in connection therewith, it is held that plaintiff is not entitled to recover the amount paid for such certificate.

Same; recovery under statute where fraud is shown.—Under the act of June 16, 1880, which provides that, when an entry is canceled by reason of its having been erroneously allowed, the entryman is entitled to refund of the purchase money; it is held that where the transaction is tainted with fraud on the part of the entryman, there is no right of recovery.

Same.—A plaintiff, or the party setting up a claim under a statute or otherwise, has a right which he can maintain only if he comes into court with clean hands.

Same.—He who comes into equity must come with clean hands; he who has done inequity shall not have equity.

The Reporter's statement of the case:

Mr. F. W. Clements for the plaintiff.

Mr. John P. Rusk, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Mr. Charles E. Collett* was on the brief.

The court made special findings of fact, as follows:

1. The plaintiff is a citizen of the United States and a resident of Spokane, Washington.

2. The plaintiff made coal land entry Juneau No. 21, United States Coal Land Survey No. 64, on account of which he paid to the local land officers at Juneau, Alaska, the purchase price of $1,587.62, and received a final certificate and receipt.

3. The plaintiff's entry was one of thirty-three similar entries which were situated between parallel east and west lines and were contiguous and compact. Each of the thirty-three applicants, including the present plaintiff, filed a sworn statement in connection with his application for patent

in the Juneau land office to the effect, in plaintiff's application, that he had expended in developing a coal mine on his claim, in labor and improvements, the sum of sixteen hundred dollars, and that he was making his entry through his agent Clarence Cunningham for his [plaintiff's] own use and benefit and not directly or indirectly for the use and benefit of any other party; that for the purpose of additional evidence of his good faith in the matter of his location and proposed entry and as a part of the application record, plaintiff filed a sworn statement to the effect that his location was made for his exclusive use and benefit and that it had ever since so remained his; that at no time prior to location or at such time, or since, had he entered into any agreement expressed or implied, by which the title to the land, or any part of or interest in the land was to pass to any other person or association whatsoever; and that if his claim went to entry and the receiver's receipt was issued for the purchase price, he would not be under any contract, or obligation, or promise to sell or convey the land to any person, persons, or association, or to put it into any company or joint holding for any purpose, or to otherwise dispose of the land, but would be free in every way to hold the land or to lease or sell it at any future time.

4. Subsequently, by a decision of the Commissioner of the General Land Office, 41 L. D. 176, the entry was held for cancellation which action was affirmed by the Secretary of the Interior and the entry finally canceled. The opinion canceling the entry recites with reference to the thirty-three entries above referred to that:

> Each * * * was improperly allowed because of fatal defects apparent on the face of the papers; and the Government has conclusively established the several charges brought against them [41 L. D. 176, 234].

Accordingly the thirty-three entries were ordered canceled by departmental decision.

5. Thereafter, the plaintiff and other entrymen, all of whom had paid the purchase prices prescribed by law for the lands which they had attempted to enter, and whose entries had been canceled by the departmental decision above cited,

made due application, under section 2 of the Act of June 16, 1880, 21 Stat. 287, for repayment or refund of the purchase prices paid by them on account of the canceled entries. Some of these applications were allowed and paid.

The claim of another of the entrymen, John G. Cunningham, was likewise duly approved and allowed by the Secretary of the Interior, but subsequently and before repayment could be accomplished the action of the Secretary was overruled by the Comptroller General and repayment was denied. Cunningham thereupon brought suit in this court to recover the amount of his payment but his suit was held barred by the statute of limitations and dismissed. On February 2, 1937, after the disposition of the Cunningham case in this court, the Secretary of the Interior rendered a decision disallowing, for reasons hereinafter stated, all the claims for repayment then pending in the Department of the Interior, including the claim of plaintiff.

6. In the meantime, charges as to the entire group of claims were heard before the Commissioner of the General Land Office. In his findings of June 21, 1911, the charges are set out as follows:

> The Government charged briefly: First, that the several locations, filings, and entries were made pursuant to an understanding and agreement entered into by all the claimants prior to location to combine the several claims for the joint use and benefit of all the claimants; second, that each location, filing, and entry was made with the unlawful purpose and intent that the titles acquired thereunder should inure to the use and benefit of an association or a corporation formed or to be formed by the several claimants; third, that no mine of coal was opened or improved on any of the several tracts located and entered [41 L. D. 176, 179].

7. The cases involving the thirty-three claims, including the present plaintiff who was present in person and represented by counsel, were consolidated for hearing before the Commissioner of the General Land Office, and it was stipulated that the original papers, proofs, etc., pertaining to the several entries be received and considered in evidence. The facts disclosed by the opinion in 41 L. D. 176, where relevant, are likewise facts established in the instant case.

8. In his decision of June 21, 1911, canceling the entries, the Commissioner of the General Land Office found:

First, that each location was made and each tract was entered with the understanding and under an agreement that the lands so located and entered should be held for the common use and benefit of all the members of the association, and that it was further understood and agreed that the claims located and entered for the common use and benefit should be consolidated into one property and taken over by a corporation to be organized by the members of the association;

Second, that the plan of the association from the outset was to acquire a coal field at the joint expense of all the associates to be developed for their common benefit;

Third, that it had been specifically alleged and proved that each location was unlawful because prior thereto each of the several locators had agreed and confederated together that all the land embraced by the locations should be taken and held for the common use and benefit of all the claimants, a scheme which would permit an association of thirty-three persons to acquire the common use and benefit of more than 5,000 acres of the public coal lands, whereas the act under which the locations were made authorized an association to secure under its special provisions only 160 acres of such land;

Fourth, that there was not a dollar spent by any locator individually or by agent on the land he entered, but every act done and each dollar disbursed were for the purpose of determining whether the field as a whole contained workable deposits of coal;

Fifth, that plaintiff and seventeen of his associates on or about May 15, 1907, conveyed all their interests in their respective locations to a trustee to be conveyed by the trustee to a corporation which was to be organized by the associates;

Sixth, that a mine of coal was not opened or improved upon any of the thirty-three claims there under consideration.

9. On August 29, 1912, the Secretary of the Interior (who at the express request of counsel for the claimants had sat with the Commissioner at the hearings of the case) affirmed the Commissioner's decision and adopted both the Commis-

sioner's findings of fact and conclusions of law as being those of the Department.

10. Application under the Act of June 16, 1880 (21 Stat. 287), was made to the Commissioner of the General Land Office for repayment of the purchase price of plaintiff's coal entry, who denied the application for repayment on February 8, 1930. The decision of the Commissioner was affirmed by a decision of the Secretary of the Interior on February 2, 1937, who held that the repayment could not be allowed when fraud is one of the reasons for cancellation and that the entire transaction was colored by the illegal and fraudulent purpose and conduct of the entrymen.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The well-known maxim that he who comes into equity must come with clean hands, or, as it is sometimes expressed, that he who has done iniquity shall not have equity, is peculiarly applicable to this case. As is said in 21 C. J. sec. 163, p. 182:

> This maxim expresses rather a principle of inaction than one of action. It means that equity refuses to lend its aid in any manner to one seeking its active interposition, who has been guilty of unlawful or inequitable conduct in the matter with relation to which he seeks relief.

The facts stated in the findings show that the plaintiff was guilty of gross fraud on the Government in obtaining his certificate of entry, that when he paid the purchase price which he is now seeking to have refunded he had entered into a conspiracy with others to defraud the Government, and his entry was a part of the fraudulent acts agreed upon in this conspiracy. Pursuant to this conspiracy, plaintiff made an application for entry which was utterly false and in support of his application filed an affidavit which reeked with falsehood, all intended to deceive the Government officials and enable him to obtain the land described in the entry in a manner and for a purpose which he knew would prevent the entry from being approved if the real truth were known to the officers of the Government. The fraud of which plaintiff was

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guilty did not simply relate to the matter as to which he seeks relief. It was intertwined therewith and inseparable therefrom.

It appears that the entry which plaintiff made was first canceled as having been erroneously allowed, and subsequently, upon application for refund, the Secretary of the Interior disallowed the claim on account of fraud in the application. Plaintiff contends that under the statute (Act of June 16, 1880, 21 Stat. 287) when an entry is canceled by reason of its having been erroneously allowed, the entryman is entitled to refund of the purchase money. Conceding this *arguendo*, it does not prevent the application of the legal maxim which controls the decision in this case. In all cases where this maxim is applied, the plaintiff or the party setting up a claim has a right either by statute or otherwise which he could maintain if only he came into court with clean hands. He is not obliged to prove his innocence; the defense must rest upon evidence showing the contrary. In this case the proof is more than ample.

Plaintiff's petition must be dismissed and it is so ordered.

WHITAKER, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

EDWARD C. CROSSETT v. THE UNITED STATES ELISABETH R. CROSSETT v. THE UNITED STATES

[Nos. 43297, 43298. Decided January 8, 1940]

On the Proofs

Income tax; inclusion of trust income in grantor's gross income.—The design of section 219 (g) of the Revenue Act of 1924, providing for the inclusion of trust income in the grantor's gross income if the power of revocation is reserved to the grantor acting alone or in conjunction with a party not a beneficiary, was to include within the income of a grantor the income of all trusts where the grantor retained the right to revoke the trusts at any time and to resume the enjoyment of the income.

Reporter's Statement of the Case

Same; beneficiaries.—Where a husband and wife, residents of Iowa, executed a trust for the equal benefit of their minor children, reserving the right to terminate the trust if both agreed, it is held that they were not "beneficiaries" within the meaning of the statute providing for inclusion of trust income in grantor's gross income if power of revocation is reserved to grantor acting alone or in conjunction with a person not a beneficiary, although under Iowa law a husband and wife are possible heirs of their children, since the interest of husband and wife was in favor of revocation, and hence trust income was properly taxable to husband and wife.

Same.—The trust was not created for the benefit of the grantors, but for the benefit of the children, and only the children in the trust in question can be deemed beneficiaries.

Same.—Section 219 (g) cannot be construed to include a beneficiary who is also one of the grantors, when the interest in the trust of each of the grantors, as a beneficiary, consists merely of a reversionary interest in a part of the property conveyed, and a remote, contingent remainder interest in the other part.

Same; interest against revocation.—Congress plainly intended, in the enactment of section 219 (g), that the income from all trusts should be included in the income of the grantor or grantors, unless it was necessary to the revocation of the trust that the consent of some one whose interest was against revocation should be secured.

The Reporter's statement of the case:

Mr. Bernhard Knollenberg for the plaintiffs. *Mr. Joseph W. Wyatt* was on the briefs.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General Samuel O. Clark*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the briefs.

The Court, upon the stipulation of facts, which was all the evidence adduced, made the following findings of fact in each case:

1. Plaintiffs are, and at all times mentioned herein were, husband and wife and residents of the City of Davenport in the State of Iowa.

2. On December 30, 1922, the plaintiffs, Edward C. Crossett and Elisabeth R. Crossett, being co-partners and, as such, being the owners of a business conducted under the firm name and style of Crossett Land & Investment Company, as

grantors granted and assigned to said Edward C. Crossett, as grantee and trustee, three undivided one-ninth parts of the property of Crossett Land & Investment Company, by means of a certain trust agreement dated December 30, 1922.

This trust agreement, after reciting that the plaintiffs desired to make provision for their children, naming them, by the conveyance in trust of an undivided three-ninths interest in the Crossett Land & Investment Company, conveyed said interest to the trustee, provided he should hold the same "subject to the following trusts, terms, and conditions:"

> 1. One such undivided ninth part or share in the property, business, and assets of Crosset Land & Investment Company shall be held in trust for the said Carolyn C. Crossett. One such undivided ninth part or share shall be held in trust for said Elisabeth A. Crossett. One such undivided ninth part or share shall be held in trust for said Ruth R. Crossett.
>
> 2. The Trustee, and his successor or successors in trust, shall, with respect to the property of the trusts hereby created, be entitled to act as a partner in said Crossett Land & Investment Company and in any successor partnership, with all the rights, powers, and authority of a full partner therein, and to do any and every act or thing necessary to introduce said trustee and his successor or successors into said partnership or any successor partnership.
>
> 3. In case of the dissolution of said partnership or any successor partnership, the assets and property received on account of each of said trusts in the liquidation of such partnership shall be substituted for the original property of the trust, and the trustee, and his successor shall have full power and authority to collect and receive the same, to sell and dispose thereof, and of any part thereof, and to invest and reinvest the proceeds of any such sale, to distribute the income as provided in paragraph 4 hereof, and to hold or distribute the principal as provided in paragraph 5 hereof.
>
> 4. The trustee may from time to time during each calendar year, pay to each of said beneficiaries or apply and expend for her support, maintenance, and education, such portion of the net income and profits accruing to the undivided one-ninth part or share in the property, business, and assets of said co-partnership held in trust for such beneficiary, and of the income of any property substituted therefor, as in the

sole discretion of said trustee shall seem necessary or proper, and said trustee shall, on or before the 31st day of January in each year during the continuance of this trust beginning with the year 1924, pay to each beneficiary any portion of the entire net annual income for the preceding calendar year of the share in said copartnership held in trust hereunder for such beneficiary, or of any property substituted therefor, not previously paid to such beneficiary or expended as aforesaid for her support, maintenance, and education.

5. The principal of each of the trusts hereby created may, in the discretion of the trustee, be transferred and distributed to the beneficiary of such trust at any time.

6. The beneficiaries hereunder shall have no power to alien, convey, transfer, assign, or charge their respective interests hereunder by any instrument operating inter vivos, but they and each of them shall have power and authority to dispose thereof by will.

7. Subject to the provisions of paragraph 8 hereof, the duration of each of the trusts hereby created shall be for the life of the beneficiary thereof, and upon the death of such beneficiary the property of such trust shall be transferred and conveyed to the heirs and legal representatives of such beneficiary, or if said beneficiary shall have left a will disposing of said property as provided in paragraph 6 hereof, to the persons designated to receive such property in and by such will.

8. The trusts created hereby may be terminated at any time by an instrument in writing revoking the same, addressed to the trustee for the time being, duly executed and acknowledged by the parties of the first part, and delivered to such trustee, and upon any such revocation, this instrument shall become void and inoperative, and the titles and interests hereby created shall cease and determine, and the parties of the first part shall be reinvested with their former interest and title in and to the property hereby conveyed, as if this conveyance had not been made, *provided*, nevertheless that the trustee shall upon request of the parties of the first part execute a proper and sufficient instrument of assignment and transfer, reconveying said property to said parties of the first part.

9. On the death of either of the parties of the first part the trust hereby created shall terminate and one-half of the principal sum in the possession of the trustee at that time shall revert to the surviving party of the first part and the other one-half of the principal of said

trust shall pass to and be vested in The Bankers Trust Company of New York City, New York, as trustee subject to the provisions of the Last Will and Testament of said deceased party of the first part.

3. Upon the execution of the trust agreement mentioned in Finding 2 hereof, Edward C. Crossett accepted said grant and assignment upon the trusts set forth therein, and the trust agreement continued in full force and effect at all times during the taxable years ending December 31, 1924, and December 31, 1925. On December 31, 1926, the grantors in said trust agreement revoked the same, and the trustee acknowledged said revocation and reconveyed to the grantors all the property which by virtue thereof was vested in the trustee.

4. Carolyn C. Crossett, Elisabeth A. Crossett, and Ruth R. Crossett, named in Paragraph 1 of said trust instrument, were at all times during the taxable years 1924 and 1925, respectively, the minor unmarried children of the plaintiffs, and at all times during said taxable years the plaintiff, Edward C. Crossett, was the beneficiary named in the existing Will of his wife, Elisabeth R. Crossett, and the plaintiff, Elisabeth R. Crossett, was the beneficiary named in the existing Will of her husband, Edward C. Crossett.

5. On December 30, 1922, when the trust was created, Edward C. Crossett, the trustee, opened a set of books in the name of "Elisabeth A., Ruth R., and Carolyn C. Crossett, Trust," which books were maintained during the years ending December 31, 1923, to December 31, 1930, inclusive.

6. During the year ending December 31, 1924, Edward C. Crossett, as trustee under said trust instrument, received income from the trust estate in the amount of $61,103.60, and during said year, as trustee, expended $36,887.29 of the income for the support and maintenance of the three infant beneficiaries of the trust, and retained $24,216.31 of the income for the account of said beneficiaries.

7. During the year ending December 31, 1925, Edward C. Crossett, as trustee under said trust instrument, received income from the trust estate in the amount of $87,272.60, and during said year, as trustee, expended $37,889.83 of the

income received for the support and maintenance of the three infant beneficiaries of the trust, and retained $49,382.77 of said income for the account of said beneficiaries.

8. The undistributed income of said trust, referred to in Findings 6 and 7 hereof, was invested or deposited by Edward C. Crossett, as trustee. The cash was carried in a bank account opened and maintained in the name of "Edward C. Crossett, Special." The investments were at all times in the physical possession of Edward C. Crossett.

9. On March 7, 1925, each of the plaintiffs filed an individual income tax return for the calendar year 1924, the return of the plaintiff, Edward C. Crossett, disclosing thereon a tax due of $25,423.52, and the return of the plaintiff, Elisabeth R. Crossett, disclosing thereon a tax due of $5,851.11. The above amounts were duly paid by said plaintiffs in installments during the year 1925. Attached to each of said income tax returns was a memorandum as follows:

> A fiduciary return, Form 1041, is being filed by E. C. Crossett as Trustee for Elizabeth A., Ruth R., and Carolyn C. Crossett, under a trust created December 31, 1922.
>
> A portion of the income received by such trusts during the year 1924 may come within the language of subdivisions (g) and (h) of Section 219 of the Revenue Act of 1924; but none of it is shown on this return as income taxable to this taxpayer on the ground that the provisions above mentioned and the Regulations thereunder, insofar as they attempt to tax, as income, amounts not received by the taxpayer, are unconstitutional and invalid.

On March 11, 1926, each of the plaintiffs filed an individual income tax return for the calendar year 1925, the return of the plaintiff, Edward C. Crossett, disclosing thereon a tax due of $19,277.93, and the return of the plaintiff, Elisabeth R. Crossett, disclosing thereon a tax due of $9,792.18. The above amounts were duly paid by said plaintiffs in installments during the year 1926. Attached to each of said returns was a memorandum similar in all respects to that attached to the returns for 1924, above quoted.

10. In his final determination of the income tax liability of each of the plaintiffs for the years 1924 and 1925, respec-

tively, the Commissioner of Internal Revenue allocated one-half of said sum of $61,103.60 received by said trustee during the year 1924—namely, the sum of $30,551.80, to the income of each plaintiff for the taxable year 1924, and one-half of said income of $87,272.60 received by said trustee during the year 1925—namely, the sum of $43,636.30, to the income of each of the plaintiffs for the year 1925.

On the basis of the aforesaid allocation of said sums to the income of the plaintiff, Edward C. Crossett, for the years 1924 and 1925, respectively, and pursuant to waivers duly executed by the plaintiff, the Commissioner of Internal Revenue on January 11, 1930, assessed additional taxes against the plaintiff, Edward C. Crossett, for the year 1924 in the amount of $11,308.50, together with interest thereon of $3,018.67, and for the year 1925 in the amount of $8,724.86, together with interest thereon of $2,001.81. Said additional taxes and interest were paid by said plaintiff on February 11, 1930, to the Collector of Internal Revenue for the District of Iowa, and said amounts have been covered into the Treasury of the United States.

On the basis of the aforesaid allocation of said sums to the income of the plaintiff, Elisabeth R. Crossett, for the years 1924 and 1925, respectively, and pursuant to waivers duly executed by the plaintiff, the Commissioner of Internal Revenue on January 11, 1930, assessed additional taxes against the plaintiff, Elisabeth R. Crossett, for the year 1924 in the amount of $8,497.43, together with interest thereon of $2,268.29, and for the year 1925 in the amount of $8,628.96, together with interest thereon of $1,979.81.

The additional taxes and interest were paid by said plaintiff on February 11, 1930, to the Collector of Internal Revenue for the District of Iowa, and the amounts have been covered into the Treasury of the United States.

11. On December 24, 1932, each of the plaintiffs filed with the Collector of Internal Revenue for the District of Iowa claims for refund of the aforesaid additional taxes paid by them for the years 1924 and 1925, respectively, on the ground, among others, that the income of the trust should be eliminated from their taxable income as the result of any

decision which might be made determinative of the constitutionality of that portion of section 219 (g) or (h) under which they had been taxed, referring specifically to the case of *Reinecke* v. *Kenneth G. Smith, et al., Executors*, 61 F. (2d) 324. Thereafter, on September 23, 1933, and before final rejection of the above claims for refund, each of the plaintiffs filed with the Commissioner of Internal Revenue a memorandum, or protest to the Commissioner's letter of August 16, 1933, in which he had proposed to disallow the above-mentioned claims. In said memorandum, or protest, the plaintiffs contended that under the trust agreement they were each contingent beneficiaries thereunder, and that the facts and circumstances place the case without the operation of section 219 (g) of the Revenue Acts of 1924 and 1926 (43 Stat. 253, 277; 44 Stat. 9, 34).

The above claims for refund were all rejected by the Commissioner of Internal Revenue on a schedule dated April 6, 1934.

12. Each of the plaintiffs is the sole owner of the claims sued upon, respectively, and has never transferred or assigned the same, or any part thereof, or any interest therein, and no action has been had on said claims before the Congress or any of the Departments of the Government, except as herein stated.

The court decided that the plaintiffs were not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

On December 30, 1922, the plaintiffs, who are husband and wife, jointly executed a trust conveying to Edward C. Crossett, as trustee, a three-ninths undivided interest in the Crossett Land & Investment Company, which the plaintiffs owned as copartners, for the equal benefit of each of their three minor children. Unless revoked, the trust for the benefit of each child was to continue for her life, and at her death the property was to be conveyed to her heirs and legal representatives.

The beneficiaries had no right to dispose of the property during their lifetime, but did have the right to dispose of

it by will. The grantors, however, reserved the right to terminate the trust at anytime, both parties agreeing thereto.

Neither of the plaintiffs included in his or her individual income tax return for the years 1924 and 1925, during both of which years the trust was in effect, any part of the income of the trusts, but they now concede that that part of it which was expended for the support and maintenance of the beneficiaries, their children, should be included. The Commissioner of Internal Revenue included one-half of all of the income in the individual income of each of the grantors.

The plaintiffs say this was erroneous because the trust does not come within the terms of section 219 (g) of the Revenue Act of 1924. This section provides for the inclusion in the gross income of the grantor of the income from a trust, if the power of revocation is reserved to the grantor, acting alone or in conjunction with a person not a beneficiary of the trust. The plaintiffs say this trust does not come within its terms because it could not be revoked without the consent of both the grantors, each of whom was a possible beneficiary since under the laws of Iowa a parent succeeds to all of a child's property if he dies without issue and unmarried, and to a portion thereof if, although married, he dies without issue.

The design of section 219 (g) was to include within the income of a grantor the income of all trusts where the grantor retained the right to revoke it at anytime and to resume the enjoyment of the income therefrom. It was thought that the grantor's right to revoke it at any time was not restricted by the inclusion of a provision giving him the right to revoke only with the consent of another, if the other were not a beneficiary, because the other having no interest against revocation, it was assumed that he would offer no objection thereto. On the other hand, if the trust were revocable only with the consent of the beneficiary, the grantor's right to revocation was not free and untrammelled, since the beneficiary's interest was against revocation and, therefore, the income from such a trust was not required to be included in the grantor's income. *Reinecke* v. *Smith*, 289

U. S. 172; *Reinecke* v. *Northern Trust Company*, 278 U. S. 339; *Corliss* v. *Bowers*, 281 U. S. 376.

Even if, in construing section 219 (g), a person can be considered as both a grantor and a beneficiary, it is nevertheless apparent here that the interest of each of the grantors, as beneficiaries, is not adverse to the revocation of the trust. When revoked, the grantor became revested with his original interest in the property. As a beneficiary, he had only an uncertain speculative interest dependent upon a number of factors: his surviving his children, their not making wills, their marriage, and their having issue. As a beneficiary, he could not hope to acquire an interest as great as that with which he would be revested upon revocation, unless all three children died before he did and died unmarried and without issue. Since his interest as a beneficiary is not adverse to the revocation of the trust, it would seem that for this reason alone neither of the joint grantors here can be considered as a "beneficiary" as used in this section.

The trust was not created for the benefit of the grantors, but for the benefit of the children, and only the children in this trust can in any true sense be deemed beneficiaries. Section 219 (g) cannot be construed to include a beneficiary who is also one of the grantors, when the interest in the trust of each of the grantors, as a beneficiary, consists merely of a reversionary interest in a part of the property conveyed, and a remote, contingent remainder interest in the other part.

While the section uses the singular form "grantor," we think it should be construed, in these cases at least, to mean the plural as well. See *W. L. Honnold* v. *Commissioner*, 30 B. T. A., 774, 785, 77 F. (2d) 995; Sec. 1, Chap. 1, Title 1 of the U. S. C. A.

The plaintiffs rely upon *Honnold* v. *Commissioner*, *supra; Smith* v. *Commissioner*, 59 F. (2d) 56; *Jones* v. *Commissioner*, 27 B. T. A., 171; *Stetson* v. *Commissioner*, 27 B. T. A. 173; and *Armstrong* v. *Commissioner*, 32 B. T. A. 1261.

All of these cases are to be distinguished from the one at bar because, first, in none of them was the beneficiary also one of the grantors and, second, in each case the interest of the beneficiary, though it was quite remote in some, was, at any rate, adverse to revocation of the trust.

Congress plainly intended that the income from all trusts should be included in the income of the grantor or grantors, unless it was necessary to its revocation that the grantor or grantors secure the consent of someone whose interest was against revocation. The interest of both grantors in these cases is not against but in favor of revocation.

It follows that plaintiffs' petitions must be dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

SOUTH DAKOTA WHEAT GROWERS ASSOCIATION, INC., A CORPORATION, v. THE UNITED STATES

[No. 43528. Decided January 8, 1940]

On the Proofs

Federal Farm Board operations.—Upon the Commissioner's report, pursuant to the act of Congress directing an investigation to be made concerning losses sustained during the stabilization operations of the Federal Farm Board in 1929 and 1930 by cooperative associations to which loans were made for the purpose of withholding grain from the market and for making advances to their members to stabilize prices, it is found by the Court that there was no valid contract between the plaintiff and the Federal Farm Board, as to payment by the Board of storage and carrying charges incurred by the plaintiff and hence no legal or equitable obligation on the part of the United States to reimburse the plaintiff for any of its losses.

Same.—Whether any moral obligation was created is for Congress, not for the Court, to determine.

Same.—The evidence shows that the endeavor of the Federal Farm Board, acting through the Stabilization Corporation, to prevent a decline in the market price of wheat had a beneficial result.

The Reporter's statement of the case:

Mr. Ben S. Fisher for the plaintiff.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Paul Campbell* was on the brief.

The court made special findings of fact as follows:

1. Public Resolution No. 134, 74th Congress (S. J. Res. 38), approved by the President on June 26, 1936, 49 Stat. 1983, reads as follows:

Joint Resolution

To provide for an inquiry by the Court of Claims with respect to losses sustained by cooperative marketing associations in connection with stabilization activities in grain.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Court of Claims, in accordance with such rules as it may adopt, shall investigate losses sustained during the stabilization operations of the Federal Farm Board in 1929 and 1930, by cooperative associations to which loans were made, either directly or indirectly, by the Federal Farm Board, through withholding grain from the market and making advances to their members in order to stabilize prices, for the purpose of determining—

(1) The amount of loss, if any, in the case of each such association and the facts and circumstances relating to such loss; and

(2) Whether, because of any agreement or understanding between such associations, or any of them, and the Federal Farm Board (or any member, officer, or employee thereof) or because of any other facts or circumstances, there is any legal, equitable, or moral obligation on the part of the United States to reimburse such associations, or any of them, for the whole or any part of any such loss.

The court shall report to Congress, at the earliest practicable date, the results of its investigation and determinations, together with such recommendations as it deems appropriate.

2. At all times mentioned herein plaintiff has been and is now a non-profit cooperative corporation, without capital stock, duly organized under the laws of the State of South Dakota, for the purpose of pooling, storing, and marketing wheat produced by its members in an orderly manner in order to eliminate speculation and waste, and having Aberdeen, South Dakota, as its principal place of business.

During said times, plaintiff has been and is now a cooperative corporation within the meaning of an Act of Congress approved February 18, 1922, entitled an "Act to Authorize Associations of Producers of Agricultural Products," known as the Capper-Volstead Act, and also within the meaning of an Act of Congress approved June 15, 1929, entitled the "Agricultural Marketing Act."

3. During the years 1929 and 1930 plaintiff had approximately 4,000 members who were engaged in the production of wheat and all of whom had signed contracts under the terms of which they agreed to deliver the wheat produced by them during the year 1929 to the plaintiff so that plaintiff might market the same for its members cooperatively as provided in its articles of incorporation and by-laws and sell the same at such time as the officers of plaintiff deemed advisable.

The marketing season for the wheat produced in 1929 extended from July of 1929 to July of 1930.

4. During the years 1929 and 1930 there were a number of cooperative associations similar to plaintiff all organized, existing, and operating in different parts of the grain growing area of the United States in conformity with the Acts of Congress referred to in finding 2, and all these associations were interested in the marketing of wheat produced by their farmer members in such manner as to reduce waste and speculation and to stabilize the market for wheat by providing adequate facilities for holding, storing, and handling wheat and by making loans or cash advances to their farmer members.

5. The Agricultural Marketing Act provided for the Federal Farm Board consisting of nine members, eight of whom were appointed by the President and confirmed by the Senate, and the Secretary of Agriculture was ex officio the ninth member. This Board was organized on July 15, 1929, with Alexander Legge[1] as Chairman. The Act made available to the Farm Board a revolving fund in the sum of $500,000,000.00 and loans from this revolving fund were

[1] Mr. Legge resigned as Chairman of the Farm Board on March 6, 1931, and he died December 3, 1933.

thereafter made to the plaintiff and to other cooperatives for the purpose of carrying out the policy of Congress as declared in the Act.

6. During the summer and fall of 1929, there were delivered to plaintiff by its members several hundred thousand bushels of wheat. As the wheat was delivered plaintiff advanced to its members 75 percent of the market value thereof from money it had borrowed from the Intermediate Credit Bank of Omaha. Thereafter plaintiff proceeded to sell the wheat on the open market in Minneapolis and Duluth, Minnesota, from day to day whenever in the opinion of plaintiff's manager the market price justified the sale of the wheat.

7. During the Fall of 1929 a financial panic of major proportions swept over the United States affecting particularly the markets for corporate stocks and bonds and for grains. With the outbreak of the panic the market value of wheat and other grains declined drastically. The Farm Board invited certain of the cooperative associations including the plaintiff to meet in Chicago, Illinois, on October 26, 1929, for the purpose of considering ways and means of stopping the fall in prices of wheat and other grains. The members of the Farm Board were of the opinion and so stated at this meeting that the crop conditions were such in wheat producing areas of the world and the world's supply of wheat was such that the prices of wheat should be much higher on the markets than the prices then existing and that one of the principal causes of the drastic decline was the movement of an excessive supply of wheat to the markets at that time. As an inducement to the cooperative associations to hold back their wheat from the market, the Farm Board offered to make loans to the cooperatives from which they could make further or increased advances to their farmer members on the basis of a value of $1.25 per bushel for No. 1 northern spring wheat at Minneapolis and $1.12 per bushel for No. 1 durum wheat at Duluth less freight, interest and carrying charges to the first day of July, 1930. The wheat values just referred to were their market values at the time, which values were considerably less than before the commencement of the panic. The rep-

resentatives of the Farm Board further stated that the Board was prepared to loan $100,000,000.00 to the cooperatives and their members for holding wheat in storage. Shortly thereafter plaintiff made application for a loan and received a loan from the Farm Board the latter part of 1929, which was used by plaintiff to increase the advances to its members.

8. After October 26, 1929, plaintiff stopped the shipping of wheat owned by it and wheat thereafter delivered to it by its members, and plaintiff did not thereafter sell any wheat delivered to it except a small quantity of odd grades and varieties which could not be mixed with other wheat held by plaintiff and which it was forced to sell because of lack of storage facilities. The small amount of wheat sold by plaintiff was delivered to it between October 26, 1929, and February 10, 1930. The withholding of wheat by plaintiff from the market was done to comply with the request of the Federal Farm Board in the belief that the joint action of all the cooperatives in withholding wheat from the market would restore the market prices of wheat.

On October 26, 1929, plaintiff had on hand 628,318 bushels of wheat of which the market price was $1.25 per bushel for No. 1 northern spring wheat at Minneapolis and $1.12 per bushel for No. 1 durum wheat at Duluth. These prices or higher could be obtained for wheat during the months of November and December 1929. If plaintiff had followed its usual practice in marketing wheat, 90% of the wheat on hand the latter part of October 1929 would have been marketed by February 1, 1930. From October 26, 1929, to February 10, 1930, plaintiff's members delivered to it 52,963 bushels of wheat.

9. From November 1929 to February 10, 1930, plaintiff paid out the sum of $22,640.55 for storage charges on the wheat and during the same period plaintiff paid out $7,276.38 for interest on money borrowed on the wheat.

10. The action of plaintiff and the other cooperatives in holding their wheat off the market did assist the Farm Board in stabilizing the prices of wheat during the period from October 26, 1929, to February 10, 1930, and enabled thousands of farmers and owners of wheat and members

of the private grain trade not affiliated in any manner with any cooperative association to obtain prices for their wheat in excess of the fixed loan prices referred to in finding 7.

The effect of the loans made by the Farm Board to the cooperative associations was temporary. The market for wheat strengthened a while and then began to decline again to a degree that by February 1930 it was clear to the Farm Board that if anything effective was to be done to stop the decline in the prices of wheat it would have to be done through a stabilization corporation to take over the work which had previously been done by the cooperative associations and the Farm Board.

11. On or about February 10, 1930, the Farm Board completed the organization of the Grain Stabilization Corporation pursuant to power given it under the Agricultural Marketing Act for the purpose of preventing a decline in the market price of wheat. The Farm Board acquired facilities for buying, holding, and storing wheat and announced and gave wide publicity of its intention to stabilize the market prices of wheat by purchasing all country-run wheat from all sources at the fixed loan prices of $1.25 per bushel for No. 1 northern spring wheat and $1.12 per bushel for No. 1 durum wheat. Immediately thereafter many millions of bushels of wheat were sold to the Grain Stabilization Corporation at the aforesaid prices and many farmers and owners of wheat and members of the private grain trade not in any way affiliated with cooperative associations were permitted to sell their wheat to the Grain Stabilization Corporation. Although the Grain Stabilization Corporation suffered heavy losses on its wheat-purchasing program, the added income to farmers on wheat as a result of the maintained prices was greater than the losses of the Stabilization Corporation.

12. In the latter part of January 1930 the manager of plaintiff had a conversation with Chairman Legge in Chicago concerning turning over its grain to the Farm Board. The storage and carrying charges were accumulating on plaintiff and at the time there was not much prospect

of wheat prices going above the fixed loan prices heretofore referred to, at which prices plaintiff could deliver its wheat to the Farm Board and from which plaintiff would have to deduct the carrying charges. Chairman Legge urged the plaintiff not to turn the wheat over to the Board at that time and stated the Board would take care of plaintiff in its storage and carrying charges.

On or about January 28, 1930, the manager of plaintiff reported this statement of Chairman Legge to an annual convention of delegates from the members of plaintiff assembled in Aberdeen, South Dakota. The matter was discussed and the convention voted to instruct its manager to continue to hold the wheat, relying on the manager's report of Chairman Legge's statement that storage and carrying charges would be taken care of. Relying on these assurances, plaintiff decided to withhold delivery of its wheat until July 1, 1930, or until requested by the Farm Board to do otherwise.

13. Plaintiff on or about February 10, 1930, had 681,281 bushels of wheat on hand. This wheat and all other wheat received by it from its members thereafter was withheld until June 12, 1930, when it was delivered to the Grain Stabilization Corporation. At that time the prices of wheat had declined to such an extent that it was impossible to sell the same on the open market for the fixed loan prices heretofore referred to. Plaintiff was paid by the Grain Stabilization Corporation the fixed loan prices but the Farm Board then refused to pay any part of the storage and interest charges which plaintiff was obliged to pay prior to June 12, 1930. Between February 10, 1930, and June 12, 1930, plaintiff received 149,903 bushels of wheat from its members.

14. From February 10, 1930, to June 12, 1930, plaintiff paid out $29,836.28 for storage charges on the wheat it had on hand during that period and during the same period plaintiff paid out $10,637.50 for interest on money borrowed on the wheat.

15. Plaintiff in cooperating with the Farm Board in its stabilization program from October 26, 1929, to June 12,

1930, had to maintain a complete office personnel at Minneapolis and also at Aberdeen, and thereby incurred additional expense to pay salaries of office helpers and to meet administrative and overhead expense. A considerable portion of the additional expense was due to the added work necessary to make the advances to the members of the money loaned to plaintiff by the Farm Board. The expense to plaintiff in carrying its wheat the way it did was approximately $15,000 more than it would have been if the wheat had been handled in the way it was handled in other years.

16. It was policy of the Farm Board to take over the wheat of cooperatives, to which it had made loans, at the fixed loan prices, and that the customary carrying charges, which included storage charges and interest, were to be borne by the cooperatives. The Farm Board directed the Grain Stabilization Corporation to take over the wheat from the cooperatives, to which the Farm Board had made loans, at the fixed loan prices, an dto require the cooperatives to pay all carrying charges of every kind and description, including interest and storage. As heretofore stated plaintiff delivered its wheat to the Grain Stabilization Corporation June 12, 1930. The final settlement was made February 1931.

17. Before June 1930, between June 1930 and February 1931, and after February 1931, telegrams, letters and resolutions regarding settlements, claims, adjustments, etc., were sent by plaintiff to the Farm Board and the Grain Stabilization Corporation. At no time did plaintiff in writing refer to the alleged oral assurance of Chairman Legge to plaintiff's manager that plaintiff would be taken care of in the additional carrying charges incurred by it in assisting in the Farm Board stabilization program. This oral assurance was not communicated by Chairman Legge to the Farm Board.

The last time plaintiff's manager spoke to Chairman Legge about being paid for plaintiff's additional carrying charges was in May 1930, when Legge told him that that would incur trouble with the Comptroller General. Two

other cooperatives had like claims and the manager decided to await the outcome of their claims, but there were no helpful developments. All efforts to collect storage and interest charges were fruitless. Then the matter was presented to Congress, which resulted in the Joint Resolution referred to in finding 1.

GREEN, *Judge*, delivered the opinion of the court:

This case comes before the court pursuant to a joint resolution of Congress directing this court to investigate losses sustained during the stabilization operations of the Federal Farm Board in 1929 and 1930 by cooperative associations to which loans were made by the Federal Farm Board through withholding grain from the market and making advances to their members to stabilize prices. The object of the investigation is to determine the amount of loss, if any, in the case of each association and the facts and circumstances with relation to such loss, and especially whether because of any agreement or understanding between such associations and the Federal Farm Board, or any member, officer, or employee thereof, or because of any other facts or circumstances, there is any legal, equitable, or moral obligation on the part of the United States to reimburse such associations for the whole or any part of such loss.

The findings in this case show that in the latter part of January 1930, the manager of plaintiff conferred with the chairman of the Federal Farm Board with reference to turning over the wheat which it held to the Farm Board at the fixed loan prices, and the chairman urged the plaintiff not to do this and stated that the Federal Farm Board would take care of the plaintiff on its storage and carrying charges. The principal witness for the defendant on this point (the chairman of the Federal Farm Board, Mr. Legge) was deceased at the time the testimony was taken and counsel for defendant insist that the circumstances of the case impeach the testimony of the manager. There are some facts recited in the findings that tend to rebut the testimony of the manager, but after reviewing the evidence

we have approved the findings of the commissioner of this court who heard the witnesses and found that the promise was made. We think, however, that the officers of the plaintiff must have known that Legge had no right or authority to make any such agreement and this knowledge is probably the reason that in letters, telegrams, and resolutions regarding statements, claims, and adjustments of the losses sustained by plaintiff there was no mention made or any reference of any kind to such an agreement.

In the case of *North Pacific Grain Growers, Inc.*, v. *United States*, *ante*, p. 189, this day decided by this court, following the rule laid down by the Supreme Court we held that the word "equitable" or "equitably" in such cases as we have before us means merely that the rules of law applicable to the case shall be construed "liberally in favor of the claimants." There being no valid contract between the plaintiff and the Farm Board, there was no legal or equitable obligation on the part of the United States to reimburse the plaintiff for any of its losses.

Counsel for defendant strenuously object to a large portion of the findings of the commissioner of this court on the ground that the matters objected to are immaterial. If the investigation were to be confined to matters which bear upon the strictly legal phases of the case, there is much in the commissioner's report which should be excluded. But we think the intention of Congress was to require that such facts be reported as we consider might bear on this question of a moral obligation and for this reason have included matters which otherwise would be immaterial. In this connection it should be noted the evidence shows that during the period involved, the Farm Board, acting through the Stabilization Corporation, in the interest of the wheat growers of the country generally, was endeavoring to prevent a decline in the market price of wheat and that its efforts had a beneficial result.

For the reasons stated in the *North Pacific Grain Growers case*, *supra*, we express no opinion as to whether any moral obligation was created, which we deem a matter for Congress alone to determine.

Pursuant to the resolution, the findings and conclusions of the court will be reported to Congress.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

GRAYBAR ELECTRIC COMPANY, INC., v. THE UNITED STATES

[No. 43901. Decided January 8, 1940]

On the Proofs

Government contract; delay by the Government.—Where performance of contract by the contractor was delayed by reason of the decision of the Comptroller General that appropriated moneys were not available for any payments under the contract, it is held that this delay was due to "an act of the Government" in the meaning of article 17 of the contract.

Same; proper party to contract.—The Secretary of War, and not the Comptroller General, was the authorized official to enter into the contract with plaintiff and to pass upon the question whether plaintiff was the lowest responsible bidder.

Same; mutual obligation of parties.—Where one of the parties to a contract demands strict performance as to time by the other party, the first party must comply with all the conditions requisite to enable the other party to perform his part.

Same; waiver of time provisions.—Failure on the part of the party demanding performance to do that which the contract demanded of him to enable the other party to perform without delay within the time limit operates as a waiver of the time provisions of the contract.

The Reporter's statement of the case:

Mr. William L. Hanaway for the plaintiff. *Mr. Dana T. Ackerly*, *Mr. Herman A. Heydt, Jr.*, *Mr. Thomas J. Ward*, and *Breed, Abbott & Morgan* were on the brief.

Mr. Carl Eardley, with whom was the *Assistant Attorney General*, for the defendant.

Reporter's Statement of the Case

Plaintiff sues to recover $13,692.20, representing the total of penalties for delay deducted by the Government from amounts due plaintiff under a contract for the manufacture and delivery of certain radio transmitting equipment.

Plaintiff bases its right to recover the amount so deducted as penalties for delay from the amount otherwise due it under the contract on Art. 17 of the contract which relieves plaintiff from being charged with penalties for delays due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, and to acts of the government.

Having made the foregoing preliminary statement, the court made special findings of fact as follows:

1. At the times herein mentioned, plaintiff, a New York corporation, having its principal office at New York City was and now is a wholesale distributor of electrical equipment and the sole selling agent for Western Electric Company, a corporation engaged in the manufacture of electrical equipment. The Western Electric Company contracted to manufacture for plaintiff the equipment described in plaintiff's contract with defendant.

2. December 10, 1935, a contract in writing was entered into between plaintiff and the United States in which plaintiff covenanted and agreed to furnish for good and valuable consideration certain radio transmitters, as is more fully set forth and described in the contract designated No. W 1049—SC–430 Order No. SC–132372.

3. These transmitters were to be delivered as follows, according to the contract:

> *Delivery.* The sample equipment will be ready for inspection at your factory within 135 calendar days after receipt of written notice of award. The remainder of the equipments will be ready for inspection at your factory as follows: Four equipments within 110 calendar days after approval of the sample and five equipments every two weeks thereafter until the order is completed.

4. Sample was delivered and approved by defendant as of November 24, 1936, by letter dated November 23, 1936. Defendant established November 24, 1936, as the date of

the approval of the sample and as the date from which all future deliveries were to be timed.

5. As a result delivery of the equipments was due under the contract at intervals of two weeks commencing March 14, 1937, and terminating May 23, 1937. Actually, said equipments were delivered at irregular intervals commencing on May 14, 1937, and terminating on June 25, 1937. The delay in the delivery of said equipments was for varying periods ranging between 33 and 61 days.

6. The contract provided, Article I, for liquidated damages for delayed delivery resulting from plaintiff's fault, as follows:

> As specified in Purchase Order No. SC–132372. Liquidated damages will be deducted at the rate of one-tenth of one per cent (.1%) per day of the cost of material included in the contract not delivered within the time specified therein, provided that in the event the damages fall below the rate of $10.00 per day, a minimum of $10.00 per day will be charged for any undelivered portion of the order.

7. Article 17 of the contract excused plaintiff from any delay produced or caused by defendant, and provided among other things as follows:

> *Provided further*, That the contractor shall not be charged with liquidated damages or any excess cost when the delay in delivery is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God or the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather but not including delays caused by subcontractors; *Provided further*, That the contractor shall, within ten days from the beginning of any such delay, notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and extent of the delay and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

Plaintiff complied with all requirements of this article.

8. February 17, 1936, before the sample apparatus was due, or had been completed or approved, the Comptroller General of the United States rendered a written opinion to the War Department in reference to the contract in question as follows:

> You state that the specification was written on the broadest lines possible to enable prospective bidders to offer equipment of their own design or development provided it met the specifications. It was provided, also, that "each bidder shall supply a complete description of the equipment which he proposes to furnish including schematic and outline drawings and detailed data on performance." The bid of the low bidder, the Radio Receptor Company, Inc., appears to have been accompanied by specifications, drawings, and certain other information required by the advertisement for bids but there are pointed out in your letter numerous instances wherein such specifications did not comply in all respects with the Government specifications. It is to be observed, however, that there accompanied the bid of the Radio Receptor Company, Inc., and made a part thereof, a statement with reference to its specification, as follows:
>
> "The attached specifications cover equipment which in the opinion of this organization is strictly in compliance with Signal Corps Specifications SC–171–97 as modified by Signal Corps Proposal NY–36–46. Any deviation from these specifications stipulated in the attached specifications of this organization should be considered an error in the attached specifications and not an exception to Signal Corps Specifications 171–97."
>
> The legal effect of the notation on said bid is an offer to furnish the equipment in strict accordance with the Government specifications. See 10 Comp. Gen. 160, 164, wherein it was said:
>
> "When a contractor has agreed to meet Government specifications and has furnished a performance bond for that purpose, such contractor must meet the specifications in the products manufactured and delivered or else the Government may cancel the contract, purchasing material meeting the specifications in the open market and collect from the defaulting contractor or his surety any excess cost occasioned the Government. This is settled law and appears to be understood by all concerned. The fact that a bidder's commercial prod-

uct does not meet the Government specifications is no reason for rejecting its low bid when such bidder proposes to meet the Government specifications—Through such changes or adaptations in its commercial product or as the bidder may be able otherwise to do. If its bid is accepted, its obligation is to meet the specifications in the deliveries made and it is of no controlling concern to the United States that the bidder may or may not be required to make changes or adaptations in its commercial product. There is neither legal nor equitable basis for rejecting a low bid proposing to meet the specifications simply because the bidder's commercial product does not meet the specifications—in this case, apparently does not have collars and skids. This would seem to be self-evident for such bidder was not offering its commercial product but a product meeting the specifications."

It is assumed that the advertised specifications fully set forth the needs of the War Department, and while the specifications submitted by the Radio Receptor Company, Inc., did not in all respects accord with the Government specifications, it is clear from the above quoted statement that the company intended to furnish specified equipment if awarded the contract. No question is raised as to the responsibility of the low bidder in this case, and it is to be noted that, in addition to the furnishing of a performance bond, the successful bidder is required by the specifications to submit for approval a sample of the transmitter proposed to be furnished. This the low bidder offered to do. In view of the facts now before this office, and having regard to the requirements of section 3709, Revised Statutes, there appears to have been no legal basis for the rejection of the low bid of the Radio Receptor Company, Inc. Accordingly, you are advised that appropriated moneys are not available for any payments under the contract as awarded.

9. March 9, 1936, the Chief Signal Officer, War Department, wrote plaintiff that the Comptroller General of the United States under date of February 17, 1936, had advised the War Department that the monies appropriated were not available for any payments under the Contract No. W 1049 SC-430 Order No. SC-132372, and requested plaintiff to advise the War Department without delay whether it desired to proceed under the contract.

10. March 18, 1936, plaintiff wrote Major R. C. Vickers, Contracting Officer, War Department, among other things, stating as follows:

> It appears from the letter of the Comptroller General to you in this case, dated February 17, 1936, that Radio Receptor Company's specifications contained the following paragraph:
>
> "The attached specifications cover equipment which in the opinion of this organization is strictly in compliance with Signal Corps Specification SC–171–97, as modified by Signal Corps Proposal NY–36–46. Any deviation from these specifications stipulated in the attached specifications of this organization should be considered an error in the attached specifications and not an exception to Signal Corps Specification 171–97." Apparently the Comptroller General held that the legal effect of the above quoted notation on said bid was an offer to furnish the equipment in strict accordance with the Government specifications. Having been a competent and responsible supplier of equipment and materials for the United States Government over a period of years, we feel we would be remiss in not entering a vigorous protest against the policy of considering that such a statement as quoted above is material or relevant to the granting of an award. We have always been made to believe that any deviation from a specification by a bidder was an exception to such specification and may be considered as not responsive to the advertisement. It seems to us, further, that such deviations supported by such a statement might indicate a lack of knowledge of the requirements, as set forth in the Government specifications. Furthermore, if such a clause could be considered as an accepted policy for the future, it might create a dangerous precedent in that all specifications accompanying Government proposals would be meaningless in determining who is entitled to the award.
>
> It is our understanding that these transmitters are to be installed in strategic locations throughout the United States and to comprise an alert network for communication between point to point with airplanes and thereby become an important part of our national defense program. In view of the importance of the entire project, it would seem most unfortunate to have delivery of the entire equipment as now scheduled de-

layed indefinitely as a result of the Comptroller General's present ruling. Our ability to fulfill the obligations under this contract and the delivery schedule demanded is made possible by the fact that the equipment which we propose to furnish is one of our standard commercial products, as described in the sales bulletin attached, with certain changes and modifications necessary to make it comply fully with the specifications as set forth in your proposal and clearly described in the descriptive data which accompanied our bid.

In view of the foregoing we respectfully urge that you request a reconsideration by the Comptroller General with the view of permitting us to proceed with the assurance that the Government will fulfill its part of the contract.

11. On April 15, 1936, the Secretary of War wrote an eight-page letter to the Comptroller General of the United States reviewing the history of this case and concluding with the following paragraph:

For the reasons indicated above, it is the opinion of the War Department that the award in this case was proper, and that in the light of the information herein given, you will concur in that opinion. It is, therefore, requested that you give the matter further consideration and withdraw your objections to payments under the contract awarded.

12. April 23, 1936, the Contracting Officer in the War Department wrote plaintiff as follows:

In connection with the above-mentioned contract there is enclosed for your information a copy of a letter dated April 15, 1936, from the Secretary of War to The Comptroller General of the United States, in which reconsideration is requested of the decision rendered by The Comptroller General in decision of February 17, 1936.

The Chief Signal Officer of the Army has been directed by the Assistant Secretary of War to inform you through the Contracting Officer that the War Department has no choice but to call upon your company to manufacture and deliver the supplies called for in accordance with the contract above-quoted. Moreover, any failure on the part of your company to do so may render it necessary for the War Department to resort

to the remedies provided in Article 17 of said contract, subject "Delay—Liquidated Damages."

The War Department expects prompt compliance with the contract. In this connection this office expects the sample radio transmitter to be ready for inspection on April 25, 1936.

13. The War Department insisted that the contract was legal and binding, and that plaintiff should disregard the ruling of the Comptroller General and proceed with the performance of the contract, but neither the contracting officer nor the Secretary of War advised plaintiff at any time between February 17, 1936, the date of the Comptroller's decision, and January 26, 1937, the date of the Attorney General's opinion, that it would be paid by the Department under the contract. They declined until February 10, 1937, to take the position that any payments would be made by the Department. As a result the plaintiff on May 1, 1936, without abandoning the contract, advised the Western Electric Company to cease manufacture of the equipments until the matter was cleared up. The Western Electric Company ceased the manufacture and did nothing to complete the equipments between May 1, 1936, and February 5, 1937, except to complete and deliver a sample, which sample was delivered to defendant on or about August 1, 1937. On February 5, 1937, upon the order of plaintiff the Western Electric Company resumed manufacture of the equipments, and worked overtime on the manufacture thereof.

14. May 16, 1936, the Comptroller General advised the Secretary of War that his decision of February 17, 1936, upon reconsideration, had been affirmed and that no appropriated moneys were available for making any payments under the contract as duly awarded and the plaintiff was notified thereof.

15. November 23, 1936, Major R. C. Vickers, Contracting Officer, Signal Corps, War Department, advised plaintiff in writing that its sample was approved and, for the purpose of establishing delivery dates, November 24, 1936, was designated as the date of approval of sample; and that delivery pursuant to the terms of the contract would consist

of four equipments within 110 calendar days after that date and five equipments every two weeks thereafter until the order was completed.

16. November 24, 1936, plaintiff wrote the Secretary of War as follows:

> In view of the ruling of the Comptroller General of the United States set forth in your letter of March 9, 1936, which stated "appropriated moneys are not available for any payments under the contract as awarded," do you not agree the delivery date should be based upon the date the Comptroller General approves the award to this company?
>
> You, of course, appreciate, in view of the decision of the Comptroller General, we are not in a position to start manufacture of the material called for in the contract.

17. January 26, 1937, the Attorney General of the United States rendered an opinion in writing to the Secretary of War holding that the contract of December 10, 1935, between plaintiff and the War Department was a valid contract. Accordingly on February 10, 1937, the Secretary of War advised plaintiff as follows:

> In view of the statements made by the Attorney General the duty appears to devolve upon me as Secretary of War to insure that so far as the Government is concerned the terms of the contract are strictly adhered to. I, therefore, direct that payment be made to the contractor in accordance with the terms of the contract notwithstanding the expressions of opinion heretofore made by the Comptroller General.

18. Plaintiff wrote the War Department on February 11, 1937, acknowledging receipt of the Attorney General's opinion and stated that manufacture of the equipment would proceed at once. This was done with all dispatch and the equipments were completed and delivered within a reasonable time.

19. March 23, 1937, plaintiff wrote Major R. C. Vickers, Contracting Officer, requesting that, for the purpose of establishing delivery dates, February 5, 1937, the date upon which the Attorney General's opinion was received by the Secretary of War, be designated in the place and stead of November

24, 1936, the date set by the Government before the Attorney General's opinion was given.

In reply the Contracting Officer advised plaintiff as follows:

> Attention is invited to your letter of March 23, 1937, with particular reference to that part thereof reading as follows:
>
> "In view of the foregoing, and the fact that the Comptroller General's ruling was an Act of the Government, it is respectfully requested that, for the purpose of establishing delivery dates, February 5, 1937 (the date upon which we received copy of the Attorney General's opinion pertaining to this case), be designated in place and stead of November 24, 1936."
>
> In this connection it is noted that the letter referred to above is addressed to the Contracting Officer, and acting in that capacity I now advise you that the decisions of the Comptroller General in this case cannot be considered "unforeseeable causes" or "Acts of the Government" operating to excuse delays under the terms of Article 17 of the contract, and that no sufficient ground for the extension of time for deliveries as requested by your letter of March 23, 1937, is shown, and that such request must, therefore, be rejected.

This decision of the contracting officer was so grossly erroneous as to imply bad faith.

20. June 3, 1937, the plaintiff appealed from the ruling of the contracting officer to the Secretary of War as follows:

> It is, therefore, respectfully requested that under the authority granted you pursuant to Article 17 of the contract, for the purpose of establishing delivery dates February 5, 1937 (the date on which we received a copy of the Attorney General's opinion) be designated in place and stead of November 24, 1936.

July 8, 1937, the Secretary of War requested plaintiff in writing to furnish further details as a basis for considering its application for an extension of time.

September 21, 1937, plaintiff wrote the Secretary of War asking for some decision on its application for an extension contained in its letter of June 3, 1937. On December 1, 1937, plaintiff's request was rejected by the Secretary of War and the ruling of the contracting officer affirmed. This

decision of the Secretary of War was, in view of all of the facts and circumstances, so grossly erroneous as to imply bad faith.

21. June 18, 1937, a partial account was stated by the United States under the contract and $29,198.20 was paid to plaintiff covering three radio transmitting equipments delivered and accepted by defendant. At the same time defendant deducted $1,896.80 as penalty for delay in the delivery of these equipments. Plaintiff protested such deduction.

22. July 8, 1937, a partial account was stated by the United States under the contract and $39,293.71 was paid covering four radio transmitting equipments delivered and accepted by defendant. At the same time defendant deducted $2,166.29 as penalty for delay in the delivery of these equipments. Plaintiff protested such deduction.

23. July 15, 1937, a partial account was stated by the United States under the contract and $49,026.45 was paid to plaintiff covering five radio transmitting equipments delivered and accepted by defendant. At the same time defendant deducted $2,798.55 as penalty for delay in the delivery of these equipments. Plaintiff protested such deduction.

24. July 19, 1937, a partial account was stated by the United States under said contract and $19,610.58 was paid to plaintiff covering two radio transmitting equipments delivered and accepted by defendant. At the same time defendant deducted $1,119.42 as penalty for delay in the delivery of these equipments. Plaintiff protested such deduction.

25. July 21, 1937, a partial account was stated by the United States under the contract and $9,998.57 was paid to plaintiff covering one radio transmitting equipment delivered and accepted by defendant. At the same time defendant deducted $466.43 as penalty for delay in the delivery of such equipment. Plaintiff protested such deduction.

26. August 3, 1937, a partial account was stated by the United States under the contract and $79,458.08 was paid to plaintiff covering nine radio transmitting equipments de-

livered and accepted by defendant. At the same time defendant deducted $3,461.92 as penalty for delay in the delivery of these equipments. Plaintiff protested such deduction.

27. August 13, 1937, a partial account was stated by the United States under the contract and $19,973.35 was paid to plaintiff covering two radio transmitting equipments delivered and accepted by defendant. At the same time defendant deducted $756.65 as penalty for delay in the delivery of these equipments. Plaintiff protested such deduction.

28. August 17, 1937, a partial account was stated by the United States under the contract and $20,045.91 was paid covering two radio transmitting equipments delivered and accepted by defendant. At the same time defendant deducted $684.09 as penalty for delay in the delivery of these equipments. Plaintiff protested such deduction.

29. August 23, 1937, a partial account was stated by the United States under the contract and $10,022.95 was paid covering the final radio transmitting equipment delivered and accepted by defendant. At the same time the defendant deducted $342.05 as penalty for delay in the delivery of this equipment. Plaintiff protested such deduction.

30. The total of the penalties deducted by defendant from amounts otherwise admittedly due plaintiff was $13,692.20.

31. The delay of plaintiff in delivering the articles called for by the contract was due to unforeseeable causes beyond the control and without the fault or negligence of plaintiff, and such delay was due to acts of responsible Government officials, for which the Government is responsible, all within the meaning of Article 17 of the contract.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Upon the facts presented by the record in this case and set forth in the findings, we are of opinion that plaintiff should not have been charged with penalties for delay in the delivery of the radio transmitting equipment specified in the contract of December 10, 1935, and that it is entitled

to recover the amount so deducted and withheld from the total contract price otherwise admittedly due. We cannot escape the conclusion that the acts and decisions of the Comptroller General, for which the Government must be held responsible, operated seriously to delay plaintiff in having manufactured and in delivering the twenty-eight radio transmitting equipments called for by the contract. These radio transmitting devices were difficult and expensive to manufacture and the total contract price for the twenty-eight instruments called for was $290,220. It is easy to see, therefore, that the natural result of the positive decision by the Comptroller General, whose approval of warrants had to be obtained by the War Department before any payments could be made under the contract, that no monies appropriated by Congress for use by the War Department were available or could be used by the Secretary of War in making any payments under the contract with plaintiff, for the reason that, as the Comptroller General concluded, the contract was illegally awarded to plaintiff under section 3709 of the Revised Statutes, operated seriously to delay plaintiff. We think it is not important to the solution of the question here presented that the Secretary of War, and not the Comptroller General, was the authorized official to enter into the contract with plaintiff and to pass upon the question whether plaintiff was the lowest responsible bidder within the meaning of section 3709 of the Revised Statutes. Nor do we think the fact that the Secretary of War did not agree with the decision of the Comptroller General is of controlling importance to plaintiff's right to recover the penalties deducted for failure of plaintiff to deliver certain of the radio transmitting equipments within the time specified in the contract. The fact is that, as an administrative matter, the Secretary could not pay unless the Comptroller approved. The fact remains that the Comptroller General possessed the authority and, for a long period of time, positively asserted that he would not authorize any payments to be made to plaintiff under the contract for the articles therein called for. Although the Secretary of War advised plaintiff, after receipt of the Comptroller General's decision that no payments could be made

out of appropriated monies for the fulfillment of the contract, that he regarded the contract as valid and expected compliance by plaintiff therewith, he did not at any time advise plaintiff that any payment could or would be made by him for any of the articles specified and called for by the contract. On the contrary, the Secretary of War bound his department by the Comptroller General's decision by refusing to state to plaintiff that payments would be made under the contract and by entering into negotiations with the Comptroller General in an effort to have the Comptroller General withdraw his decision and authorize payments to be made under the contract as awarded. This the Comptroller General refused to do. The decision of the Comptroller General was rendered February 17, 1936, about two months after the execution of the contract and long before the sample apparatus was delivered or required to be completed and delivered to the War Department. The remaining radio instruments were not to be manufactured or delivered until after the sample instrument had been delivered, approved, and accepted. Thus the matter stood for almost a year, until January 26, 1937, when the Attorney General of the United States, at the request of the Secretary of War, rendered a written opinion in which he held and decided that the contract of December 10, 1935, between plaintiff and the War Department was a valid contract and that the Secretary of War was authorized to expend appropriated monies for making payments to plaintiff for the articles called for by the contract. This opinion was received by the Secretary of War February 5, 1937. Thereupon the Secretary of War on February 10, 1937, advised plaintiff that upon the opinion of the Attorney General it was the duty of the Secretary of War to instruct that, insofar as the Government was concerned, the terms of the contract would be adhered to and that "I, therefore, direct that payment be made to the contractor in accordance with the terms of the contract notwithstanding the expressions of opinion heretofore made by the Comptroller General." This was the first advice received by plaintiff between February 17, 1936, and February 10, 1937, from the Secretary of War, with whom the contract had been made,

that plaintiff would be paid by the department for any of the services to be performed and for the articles called for by the contract.

We can hardly imagine a more justifiable cause for the contractor's delay in promptly manufacturing and delivering the equipment than arose in this case. It was certainly unforeseeable by plaintiff and was beyond its control and without its fault or negligence. It was certainly due to acts of the Government.

We are not here concerned with any question of breach of the contract, but only with the question whether plaintiff or defendant should be held responsible for delay in performance within the time specified. It is well settled that where one of the parties to a contract demands strict performance as to time by the other party, it must comply with all the conditions requisite to enable the other party to perform his part, and a failure on the part of the one demanding performance to do that which it required of him (in this case to assure plaintiff that it would pay for what it bought) to enable the other party to perform without hindrance or delay within the time limit operates as a waiver of the time provisions of the contract. *Ittner* v. *United States*, 43 C. Cls. 336; *The New Jersey Foundry & Machine Company* v. *United States*, 44 C. Cls. 178; *American Dredging Company* v. *United States*, 49 C. Cls. 350; *The United Engineering and Contracting Company* v. *United States*, 47 C. Cls. 489, affirmed 234 U. S. 236. In the case last cited, it was held that "Here the delays of the Government prevented the claimant from a strict performance, and thereby it waived the contract time within which to perform, and that waiver operated to eliminate the definite date from which to assess liquidated damages; and though the claimant in continuing the work was thereby obligated to complete the same within a reasonable time the liquidated damage clause was not thereby restored and made applicable to an unreasonable time." In case of failure to complete within a reasonable time, the Government, having delayed the contractor, would be limited in its claim to actual damages. The contractor in the case at bar completed the work within a reasonable time after it was given assur-

ance that it would be paid for the work called for, and the Government does not show, nor does it claim, that it sustained any actual damage.

Plaintiff is entitled to recover and judgment in its favor for $13,692.20 will be entered. It is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

EMIL MOSBACHER v. THE UNITED STATES

[No. 43916. Decided January 8, 1940]

On the Proofs

Income tax; deduction for losses.—Whether or not his associates were employes, on the one hand, or partners or associates in a joint venture, on the other, determines whether taxpayer was entitled to offset against profits realized individually the losses sustained in stock trading by an association in which he was interested.

Same.—Where evidence with respect to the nature of the enterprise is meager and unsatisfactory, the agreement being oral, more than usual weight is given to the characterization of the arrangement by the parties themselves.

Same; statements by taxpayer.—Taxpayer having himself signed documents describing the association as a partnership, he is presumed to have understood and to have vouched for the statements made therein, though such documents were said to have been filed by employes ignorant of, or careless about, the true nature of the enterprise.

Same.—In view of taxpayer's reiterated designation of the arrangement as a partnership and of the unconvincing nature of the other proof, it is held that the association was a partnership and accordingly that plaintiff is not entitled to offset of losses sustained by the association against profits realized by taxpayer individually.

The Reporter's statement of the case:

Mr. Ferdinand Tannenbaum for the plaintiff. *Olvany, Eisner & Donnelly* and *Mr. Mark Eisner* were on the briefs.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the briefs.

This case involves the plaintiff's right to offset certain losses sustained in trading on the New York Curb Exchange by an association in which plaintiff was interested against profits plaintiff realized individually.

The issue in the case is whether or not his associates were employees, on the one hand, or partners or associates in a joint venture on the other.

The court, having made the foregoing introductory statement, entered special findings of facts as follows:

1. Plaintiff is, and at all times material to this proceeding was, a citizen of the United States and a resident of the State of New York, with his place of business at 19 Rector Street, New York City. He is engaged in the business of buying and selling securities principally on the New York Curb Exchange.

2. March 15, 1933, plaintiff filed his individual income-tax return for the calendar year 1932 showing gross income of $91,563.18 and net income of $63,263.59. In returning that gross income plaintiff reported a loss from what he termed "personal" business in the amount of $130,349.89, which was deducted from other items of income on his individual return. Under the item on that return for "Income from Partnerships, Syndicates, Pools, etc. (State name and address)," plaintiff reported income of $177,119.72, which he described as coming from "Emil Mosbacher et al." He also showed dividends in the amount of $5,578.98 from "Mosbacher et al." and dividends "Personal" of $28,161.70. Plaintiff paid the tax shown due on that return, $10,968.35, as follows: March 15, 1933, $2,742.09; June 15, 1933, $2,742.09; September 12, 1933, $2,241.90; December 14, 1933, $2,241.90; and August 2, 1934, $1,000.37 plus interest of $45.63.

3. On the same day on which plaintiff filed his individual income-tax return for 1932, a return signed by him was filed on a partnership return form 1065, but headed "RETURN OF INCOME FROM JOINT VENTURE." In that return in the

section provided for "Partners' Shares of Income and Credits" the following appear:

Name and address of each partner	Dividends	Balance of net income
Emil Mosbacher, Rosedale Ave., White Plains, N. Y	$5,578.98	$177,119.72
Leonard C. Greenstein, 101 Central Park West, N. Y	306.54	9,731.85
Milton Stern, 1021 Pelhamdale Ave., Pelham Manor, N. Y	122.62	3,892.74
Cecil Schwartz, 50 Riverside Dr., N. Y	122.61	3,892.74
Total	6,130.75	194,637.05

Expenses reported in that return on account of business done were in the amount of $53,288.33, which included salaries paid of $34,272. No part of the salaries so paid was to any of the individuals referred to above as "partners." That return and plaintiff's individual income-tax return were prepared by plaintiff's office manager without consultation with attorneys, and he used the term "Joint Venture" in the former return without making any detailed check as to the relationship which existed among the parties and on his personal assumption that where two or more people participated in profits it was a joint venture. Both returns, however, were signed and sworn to by plaintiff. Each of the individuals named reported in his individual income-tax return the amount shown above in the return described as "Return of Income from Joint Venture" as his share of the profits of a business carried on by the four individuals under an arrangement hereinafter shown.

4. February 8, 1935, plaintiff filed a claim for refund of $9,800 for 1932 on the ground that—

> The taxpayer reported his income on the basis of a dealer in securities and inventoried such securities at the beginning and end of the taxable year on the basis of cost or market whichever is lower. The Revenue Agent disallowed the taxpayer the status of a dealer in securities and computed his gain or loss upon cost of securities with the result that the income of the taxpayer is reduced this year by the sum of $48,643.55.

In a letter dated May 8, 1935, the Commissioner of Internal Revenue advised plaintiff in connection with his proposed disallowance of the above claim that "although your distributive share of partnership income was reduced by $48,643.55, as stated above, other adjustments were made

to the income resulting in an additional tax liabality of $49,564.22," and by letter dated May 24, 1935, advised plaintiff that that claim for refund was rejected. At or about the same time the Commissioner made an additional assessment against plaintiff on his May 1935 assessment list in the amount of $49,564.22, together with interest of $6,293.30, which plaintiff paid June 17, 1935.

5. March 12, 1937, the Commissioner and plaintiff entered into an agreement under section 608 (b) (2) of the Revenue Act of 1928 (45 Stat. 791, 871) to suspend the running of the statute of limitations provided in section 3226 of the Revised Statutes as amended and reenacted without change by section 1113 (a) of the revenue act of 1926 (44 Stat. 9, 116), on the bringing of suit by plaintiff for the recovery of taxes alleged to have been overpaid for 1932, on the ground that there was then pending the case of *Edward Klauber* v. *Commissioner*, on appeal from a decision of the Board of Tax Appeals to the United States Circuit Court of Appeals for the Second Circuit, a decision which might affect plaintiff's right of recovery of income tax paid for 1932.

That case was affirmed in 92 F. (2d), 1007, and the mandate thereon issued November 17, 1937.

6. October 9, 1936, plaintiff filed a second claim for refund for 1932 of $55,857.52 on the following ground:

> A loss of $130,434.27 from the sale of securities held for less than two years has not been allowed as a deduction against income in a greater amount realized from the sale of capital assets. The grounds for disallowance are that the taxpayer was a member of a partnership from which the income was derived. The taxpayer was not a member of a partnership but merely compensated certain individuals who were associated with him by giving to them a certain percentage of profits and commissions from the operation of the business for which they were in part responsible. Such individuals were not liable for losses which the taxpayer's business might incur, nor did they have any capital invested in the taxpayer's business. They were not to contribute to the expenses of the business. Even though a partnership existed, the loss of the taxpayer is deductible from his distributable income from such partnership when such income represents gains realized from the sale of capital assets.

Reporter's Statement of the Case

April 9, 1937, the Commissioner advised plaintiff of his proposed rejection of the above claim, stating as his principal ground for such action that the Bureau held that a partnership existed in 1932 on account of the part of the business carried on by plaintiff and his associates, and that plaintiff's individual losses could not be offset against the profit which was derived by him from the partnership.

7. Prior to and while some of the actions heretofore referred to were being taken, plaintiff filed protests and briefs in connection with his tax liability for 1930 and 1932, as follows:

(a) Protest filed with the Bureau of Internal Revenue, May 5, 1933, in which, among other things, plaintiff stated that "On April 15, 1930, a new partnership was formed, composed of Emil Mosbacher and Cecil Schwartz, Leonard C. Greenstein, and Milton Stern. This partnership acquired the interest of the prior partnership in the short sale." The association therein referred to is the one involved in this proceeding, and conditions existing with respect to the relationship between the parties were the same in 1930 as in 1932.

(b) September 13, 1933, plaintiff filed a claim for refund for 1930 in which the allegations with respect to the existence of a partnership were similar to those set out in the protest of May 5, 1933, referred to above.

(c) September 29, 1934, plaintiff submitted a protest with respect to 1932, in which he stated that "The partnership of Emil Mosbacher et al., of which the taxpayer was a partner in 1932, had a net income of $200,767.80. This total net income was derived from the sale of securities held by the partnership for less than two years."

(d) October 10, 1934, plaintiff submitted an affidavit relative to his tax liability for the year 1930, in which the following appeared:

> From January 1, 1930, to April 14, 1930, I was a member of a partnership composed of the following individuals with the following interests:
>
> | | |
> |---|---|
> | Emil Mosbacher | 75% |
> | Herman Schwartz | 15% |
> | Harold Hirschberg | 10% |

Reporter's Statement of the Case

This partnership sold securities short at a sales price of $2,529,326.91.

On April 14, 1930, a new partnership was organized composed of the following individuals with the following interests:

Emil Mosbacher	91%
Leonard C. Greenstein	5%
Milton Stern	2%
Cecil Schwartz	2%

This new partnership took over the short position of the old partnership company, paying the retiring partners for their respective interests therein at the time taken over. At such time there was a profit in the short account of $464,326.91, representing the difference between the price at which the securities had been sold short and the cost of covering the short sale.

The Revenue Agent, in his audit of the income of the new partnership for the period from April 15, 1930, to December 31, 1930, discloses a net income of $1,600,689.73 and dividends of $14,438.24. Included in this net income is the difference between the sum received from the short sales made by the old partnership and the amount of moneys expended to cover the short accounts. He, therefore, has included in the profit of the new partnership $464,326.91, none of which belonged to or was received by the members of the new partnership, who were not members of the old partnership, namely, Leonard C. Greenstein, Milton Stern, and Cecil Schwartz. It is therefore clear that none of this sum should be included in the income of these new partners.

The documents referred to above under (a), (c), and (d) were prepared by an attorney for plaintiff who at that time had under consideration before the Bureau of Internal Revenue certain questions other than whether there was or was not a partnership existing between plaintiff and the associates herein referred to for the years 1930 and 1932.

8. In his determination of plaintiff's tax liability for 1932 the Commissioner determined that plaintiff's tax for that year should be computed without the use of inventories, thereby reversing the action taken by plaintiff in including in income amounts determined by the use of inventories of securities on the basis of cost or market, whichever was lower. In that determination the Commissioner determined that

Reporter's Statement of the Case

plaintiff's income for the calendar year 1932 should be reduced in the sum of $45,077.17, and in addition made other adjustments which resulted in a total reduction in income of $48,643.35. In that determination the Commissioner refused to allow the loss of $130,349.89, claimed by plaintiff on the sale of securities held by him for a period of less than two years, as a deduction under section 23 (r) of the revenue act of 1932, on the ground that plaintiff was a member of a partnership in such year, and his distributive share of the partnership income of $128,476.17, although due to profits on sales of securities, could not be reduced by that loss.

9. During the past ten years plaintiff has been a dealer in securities, operating principally on the New York Curb Exchange, and during the years 1930, 1931, and 1932 a part of his business was carried on in his individual capacity without any of the profits being shared in by others, and a part in which others participated in the profits. For convenience and not for the purpose of giving a legal description of the two classes of business, the former will hereinafter sometimes be referred to as his "individual business" and the latter as the "firm business."

10. The arrangement under which the firm business was conducted and its profits divided arose in the following manner: April 14, 1930, at which time plaintiff terminated a similar arrangement with certain other individuals, plaintiff entered into an agreement with three individuals, Leonard C. Greenstein, Cecil Schwartz, and Milton Stern, under which they would buy and sell securities and otherwise engage in business and each would receive a stated percentage of the profits derived therefrom. Greenstein is a brother-in-law of plaintiff's wife, and Schwartz and Stern are brothers-in-law of plaintiff.

The agreement was made orally and continued only until the end of the year when a similar arrangement was made for 1931. Likewise, in December 1931, another similar arrangement was made for 1932, the year with which we are concerned. Under the arrangement made for 1932, it was agreed that net profits from the business of the firm would

be distributed as follows: Plaintiff, 91%; Greenstein, 5%; and Stern and Schwartz, each 2%. In making that arrangement no mention was made by plaintiff or any of the parties of losses or whether any loss which might be incurred would be shared in by Greenstein, Stern, and Schwartz, and the situation did not arise either in that year or in any other year when a similar arrangement was in effect where there was a loss from the operation of the business.

11. Plaintiff, Greenstein, Stern, and Schwartz were each members of the New York Curb Exchange, and each carried on the business of the firm on that exchange. All business transacted for the firm was done in the name of plaintiff, and all brokerage accounts were maintained in the name of plaintiff. Greenstein, Stern, and Schwartz had no dealings in their individual names. Each member of the firm had individual authority to transact business and to exercise his own discretion in the purchase and sale of securities for the account of plaintiff.

12. Plaintiff contributed all of the capital for the operation of both the individual and the firm business. On his books he maintained only one capital account, in which appeared not only the capital and surplus used in the transactions in securities in which Greenstein, Stern, and Schwartz participated with him, but also the capital used by him in other transactions in which he was individually concerned.

13. All expense items in connection with the individual business of plaintiff as well as the firm business were paid through an account maintained by plaintiff with William P. Hoffman & Co., such expenses being paid by Hoffman & Co., on instructions from plaintiff's office manager.

14. At the beginning of each year the amount of the drawing account for each of plaintiff's associates was fixed on the basis of an estimate of their net worth to the firm, the amounts for 1932 being approximately $20,000 for Greenstein, $7,000 for Schwartz, and $5,000 for Stern. For the purpose of drawing on the amounts fixed, each of the three individuals opened a personal account with Hoffman & Co., and these accounts were guaranteed by plaintiff. From time

to time during the year each of the three individuals made withdrawals through Hoffman & Co. against their drawing accounts, and when such withdrawals were made, appropriate charges were made in those accounts. No credits were made to the drawing accounts until the end of the year, when the profits of the firm were determined, at which time Hoffman & Co. credited each of the three individuals with his share of the profits and debited plaintiff's account with a corresponding amount. All expenses of the firm were deducted in determining the net profits of the business, and before any division of the profits was made among the plaintiff and his three associates. The withdrawals made by plaintiff's three associates did not appear in the expense account maintained by plaintiff with Hoffman & Co., nor did they appear in plaintiff's profit and loss account. Salaries of plaintiff's office manager and other individuals employed by him were paid through Hoffman & Co., and considered as one of the expense deductions insofar as they related to firm business in arriving at the profits of the firm for 1932. However, no deduction was taken for salaries for plaintiff's three associates in arriving at the net profits of the firm. After the net profits were determined they were divided on the percentage basis heretofore shown.

15. On his individual books plaintiff maintained separate profit and loss accounts for his individual business and for the firm business, two such accounts being maintained for his individual business and two for the firm business. One of his individual profit and loss accounts was maintained for the purpose of showing his individual profits or losses on the sale of securities, and in that account appears the loss of $130,349.89 which the Commissioner refused to allow plaintiff to deduct from profits realized as his share of the firm's business. The other individual profit and loss account showed dividends, interest, and rent received by plaintiff in his individual capacity.

Two profit and loss accounts were also maintained for the firm business, one showing the commissions, dividends, and interest received on the business done at the post on the exchange, with the expenses charged against such income,

and the other showing the profit or loss on the sales of stock by the firm at the post on the exchange.

16. The regulations of the New York Curb Exchange with respect to partnerships are in evidence as Plaintiff's Exhibit 13, and it is incorporated herein by reference.

No partnership agreement was filed with the New York Curb Exchange on account of the relationship existing between plaintiff and his associates, and hereinbefore referred to, for the period from January 1, 1932, to December 31, 1932, nor was a certificate of partnership filed with the Clerk of the County of New York under the partnership or general business laws.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

In this case plaintiff seeks to offset certain losses which he claims he sustained in trading on the New York Curb Exchange against his profits therefrom. The issue is whether the losses were sustained by him individually or by an alleged partnership or joint venture of which plaintiff was a member. The answer depends on whether or not the association between plaintiff and certain men named Greenstein, Stern, and Schwartz was a partnership or joint venture or whether these men were employees of the plaintiff in the carrying out of the enterprise. If employees, the plaintiff is entitled to the deduction; if partners or associates in a joint venture, he is not. *Joseph Klingenstein* v. *United States*, 85 Ct. Cls., 165, 18 F. Supp. 1015; *Percy H. Johnston* v. *Commissioner*, 86 F. (2d) 732.

The evidence as to the agreement between the parties is meager and unsatisfactory. The agreement was oral. It shows that on a certain date plaintiff dissolved his association with certain men named Herman Schwartz and Hirschberg for the selling of securities short and on that date formed such an association with Greenstein, Stern, and Cecil Schwartz, those interested in the old association being paid for their respective interests therein.

With his new associates plaintiff made an arrangement to pay them 5 percent, 2 percent, and 2 percent of the profits, respectively. No mention was made as to whether any losses would be shared in by Greenstein, Stern and Schwartz.

All the associates were members of the New York Curb Exchange, but all business was transacted in plaintiff's name. Each of the associates had authority to exercise his own discretion in the purchase and sale of securities.

Plaintiff contributed all the capital for the operation of the business, and paid all expenses, but it does not appear definitely whether anyone other than the plaintiff was entitled to a share in the assets on dissolution. Possibly it may be inferred that others were so entitled since the plaintiff stated in an affidavit filed with the Bureau of Internal Revenue [Finding 7 (d)] that upon the dissolution of the old association and its being succeeded by the new, the retiring partners were paid for their respective interests.

The facts that plaintiff's associates were paid a percentage of the profits, that they transacted business in plaintiff's name, and were authorized to use their own discretion in the purchase and sale of the securities are consistent with either relationship, that of partners or that of employees. But if the parties had an interest in the assets on dissolution, this, plus the agreement to divide the profits, and the presumption from this agreement that they also were to share the losses, would require us to hold them not to have been employees, but partners. The evidence, however, is unsatisfactory.

In such a situation we must give more than usual weight to the characterization of the arrangement by the parties themselves. They, better than anyone else, knew the true nature of the association. If Greenstein, Stern, and Schwartz had been considered as employees, as contended, their salaries would have been deducted in reporting income from the enterprise. If they had been only employees, the profits from the venture would not have been described as profits from a joint venture in plaintiff's income tax return, nor would a separate partnership return have been filed. Also in two protests filed with the Bureau of Internal Reve-

nue, on May 5, 1933, and September 29, 1934, plaintiff referred to the association as a partnership, and also in a claim for refund filed on September 13, 1933. In an affidavit filed on October 10, 1934, to which reference has been made before, plaintiff went more into detail and said a previous partnership had been dissolved and the present one organized.

The plaintiff's explanation that these papers were filed by employees ignorant of, or careless about, the true nature of the enterprise is not convincing. He signed some of these documents himself, and must be presumed to have understood and to have vouched for the statements made therein.

In view of his reiterated designation of the arrangement as a partnership and of the unconvincing nature of the other proof, we conclude the association was a partnership and, accordingly, that plaintiff is not entitled to the deduction.

It results that plaintiff's petition must be dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

HOOD & GROSS v. THE UNITED STATES

[No. 44196. Decided January 8, 1940]

On the Proofs

Government contract; payment of prevailing wages.—Where contractor, in the erection of a post-office building, after a survey by representatives of the contractor and the Government as to prevailing rates of wages in the locality, paid the said rates of wages, with certain increases, and likewise made an increase to bricklayers when so ordered by the Secretary of Labor, who after a hearing held that all other wages being paid were in accordance with the prevailing rates, and where in the final settlement the Comptroller General made a deduction upon a report that prevailing wages had not been paid, it is held that such deduction was arbitrary and without warrant in law.

Same; remedy of Government; termination of contract.—Under the act of August 30, 1935 (49 Stat. 1012), where there was failure to pay the rate of wages required by the contract, the remedy was termination of the contract by the Government.

The Reporter's statement of the case:

Mr. Prentice E. Edrington for the plaintiff.

Mr. John B. Miller, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact, as follows:

1. Plaintiff is a copartnership, composed of Frank C. Hood and George E. Gross, is engaged in the building construction business, and has its principal office in Philadelphia, Pennsylvania.

2. Plaintiff entered into a contract with the defendant, represented by C. J. Peoples, Director of Procurement, Treasury Department, as contracting officer, April 25, 1935, whereby, for the sum of $37,297.00, the plaintiff agreed to furnish all labor and materials and perform all work required for the demolition of the structures on the site and the construction of the post office at Red Lion, Pennsylvania. Made a part of the contract were specifications dated December 20, 1934, addendum thereto dated January 3, 1935, and joint regulations of the Secretary of the Treasury and Secretary of the Interior dated January 8, 1935, effective January 15, 1935, concerning rates of pay for labor, copies of which appear in evidence as plaintiff's Exhibit No. 2 and are made part hereof by reference.

The contract work was started in May and completed in December of 1935.

Plaintiff based its bid for the work on prevailing rates of wages and not on code rates.

3. In its bid plaintiff was required to and did certify as follows:

> It is hereby certified that the undersigned is complying with and will continue to comply with each approved code of fair competition to which he is subject, and/or if engaged in any trade or industry for which there is no approved code of fair competition, then as

to such trade or industry that he has become a party to and is complying with and will continue to comply with an agreement with the President under Section 4 (a) of the National Industrial Recovery Act (President's Reemployment Agreement) and that all other conditions and requirements of Executive Order No. 6646, dated March 14, 1934, are being and will be complied with.

4. At the time plaintiff signed the contract in suit it was bound by the Code of Fair Competition for the Construction Industry and was complying therewith.

This code, section 2 of Article III, established a minimum rate of 40 cents per hour as pay for common or unskilled labor, and minimum rates of pay for certain other employees not here involved, with no other rates or classifications.

Section 3 of the same article provided:

> Where provisions concerning hours of labor or rates of pay have been established for specific projects, by competent governmental authority or agencies (whether Federal, State, or political subdivisions thereof) acting in accordance with law, any employer required to comply and complying with the provisions so established shall be relieved of compliance with any conflicting provisions of this Article or of any actions taken in accordance therewith.

Supplementary to the construction industry code there became effective July 27, 1934, the Supplementary Code of Fair Competition for the Plastering & Lathing Contracting Industry. Section 1 (c) of Article III of this code provided certain minimum rates of pay per hour in the northern zone, which included Pennsylvania, as follows:

Plasterers	$1.20
Modelers	1.70
Model Maker	1.20
Casters	1.10
Lathers	1.20
Plasterers' laborers	.80

Effective June 4, 1934, there was established, supplementary to the construction industry code, the Supplementary Code of Fair Competition for the Plumbing Contracting Industry. This code, section 1 (b) of Article III thereof,

fixed $1.20 per hour as the minimum wage for skilled labor and 50 cents per hour for unskilled labor, in the northern zone, which included Pennsylvania.

Copies of these codes are filed in the case as plaintiff's Exhibit No. 15, defendant's Exhibit A, and defendant's Exhibit B, respectively.

5. Plaintiff's contract specifications provided:

> The rate of wage for all laborers and mechanics employed by the contractor, or any subcontractor, on the public building covered by this contract shall be not less than the prevailing rate of wages for work of a similar nature in the city, town, village or other civil division of the State in which the public building is located. In case any dispute arises as to what are the prevailing rates of wages for work of a similar nature applicable to the contract which cannot be adjusted by the contracting officer, the matter shall be referred to the Secretary of Labor for determination and his decision thereon shall be conclusive on all parties to the contract, as provided in the Act of March 3, 1931 (Public, No. 798).

6. Prior to commencing the work called for by the contract, representatives of the plaintiff and defendant made a survey of York County, in which Red Lion is located, to ascertain and determine the prevailing rates of wages to be made applicable to the project. The largest building, a church costing upwards of $130,000, had been erected within two years prior to this time. From the general contractor on this church project and from the Chamber of Commerce of Red Lion the prevailing rates of pay for laborers and mechanics was determined by plaintiff and defendant. The rates so established were then posted on the site of the post office project. From three weeks to a month thereafter the plaintiff voluntarily increased the rates of pay to all classes of employees, except bricklayers, five cents an hour. The rates as increased by five cents an hour were higher than the rates prevailing in York County, as determined by the survey made as described.

7. The rates of wages per hour paid to all laborers and mechanics on the job, as the rates prevailing in York County, posted as aforesaid, were as follows:

Reporter's Statement of the Case

Common laborers	[1] $0.30
Bricklayers	[2] .60
Bricklayers' helpers	.40
Plumbers	[3] 0.70–.75
Plumbers' helpers	[1] .30
Lathers	.80
Lathers' helpers	.65
Plasterers	.80
Plasterers' helpers	.65
Plasterers' laborers	[1] .30
Steamfitters	[3] 0.70–.75
Steamfitters' helpers	[4] 0.30–.35
Electricians	1.05
Painters	.65
Cement finishers	.55
Cement finishers' helpers	.35
Carpenters	.55
Carpenters' helpers	.45
Carpenters' laborers	[1] .30
Roofers	1.05
Roofers' helpers	.35
Concrete mixers	.35
Sheet metal workers	1.05
Tile setters	1.20
Tile setters' helpers	.80

[1] Advanced to 35 cents.
[2] Advanced to 75 cents.
[3] Advanced to 85 cents.
[4] Advanced to 40 cents.

8. The first exception taken by the contracting officer to the rates posted and being paid was by his letter to the plaintiff dated September 23, 1935, in which letter that officer stated:

> Reference is made to your Red Lion, Pennsylvania, Post Office contract (governed by the stipulations of the Bacon-Davis Act and of the Executive Order amplifying that Act), and to the question of the rates of wages applicable to this contract.
>
> The rates of wages which the Construction Engineer has indicated that you propose to pay appear to be extremely low for a town in Pennsylvania in close proximity of cities of considerable size. The information furnished is to the effect that they have been largely based on the rates paid in connection with a local church building recently erected, and which may have been

affected by some special conditions which would not apply to construction work in general.

The Division has a schedule of wages indicated as having been approved by the York County Wage Rate Board, operating under authority from the Federal Civil Works Administration. It is stated that this Board, whose members represented the Emergency Relief Administration, Business, Contractors, and Organized Labor, "considered rates of wages which had been paid in the past year and were being paid at the present by six employers," and that the rates decided upon were "fair prevailing rates of wages," and represented the unanimous conclusion of the Board.

In view of the evidence in the hands of this Division, demand is made that you put into effect the rates in question insofar as they involve trades to be employed on the Red Lion Post Office work. The applicable rates are as follows:

Bricklayers and Stonemasons	$1.00
Stonemasons' helpers	.55
Mortar mixers	.60
Carpenters	.90
Cement finishers	.60
Painters	.65
Plasterers	.85
Plumbers and Steamfitters	.85
Roofers	.80
Sheet Metal workers	.85
Concrete mixers	.55
Laborers	.50

The Division desires an immediate statement from you as to whether you will put the above rates into effect. A copy of this letter is being sent to the Construction Engineer so that he may advise this Division of the action taken by you as a result of this demand.

9. The plaintiff replied to this September 25, 1935, advising the contracting officer that the rates posted were the rates prevailing in York County and that the rates paid were higher than those rates, concluding:

We do not propose to change our wage rates from what we are paying at present.

10. The contracting officer referred the dispute to the Secretary of Labor, who caused a hearing to be held, at which all interested parties were given an opportunity to be heard. After reviewing the evidence the referee found and the Secretary of Labor held that the only rates posted that were below the prevailing rates were the rates paid to brick-

layers, and that as to them the prevailing rate was 75 cents an hour. Thereupon, October 23, 1935, the plaintiff, through its subcontractor, paid the newly determined rate of 75 cents to bricklayers, and to all other laborers and mechanics the posted rates, as advanced by the plaintiff.

11. No further demands for wage increases were made upon the plaintiff.

12. On July 22, 1937, the General Accounting Office certified a balance due plaintiff on its contract and from that balance caused to be withheld $766.05, which the Comptroller General explained as follows:

> The administrative officer reports that the claimant effected a saving of $766.05 in not having complied with the applicable codes. Under the terms of the contract it agreed to comply with the applicable approved code, or if no code, then with the President's Reemployment Agreement. It did not do so, at least to the extent of $766.05, it appearing that the claimant did not pay the wages it was required to pay under the code to certain of its employees. Its agreement to comply with the code in the payment of certain rates of wages rested on the contract and when it failed to pay the agreed rates of wages the Government is justified in withholding such difference from payments to it. A contractor may not violate its contract in this respect to its own advantage. Therefore, the sum of $766.05 is deducted and disallowed from the balance due under the contract.

The plaintiff protested against this settlement and asked for reconsideration. No action has been taken on the request for reconsideration.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

Plaintiff entered into a contract with the defendant through the Director of Procurement, Treasury Department, for the construction of a Post Office Building at Red Lion, Pennsylvania, on April 25, 1935. The specifications, which were a part of the contract, provided that the plaintiff was to pay the prevailing rates of wages in the locality. Prior to commencing work representatives of the plaintiff and the defendant made a survey of York County, Pennsylvania, in which the Post Office was to be located, and ascertained and

determined the prevailing rates of wages to be applicable to the project and posted these rates. Later on a dispute arose as to the proper rates of wages to be paid and the contracting officer, not being able to adjust the same, referred the dispute to the Secretary of Labor who, after a hearing, made a decision that the prevailing rates were correct except as to the bricklayers, which rate should be increased to seventy-five cents an hour. From that time plaintiff paid the bricklayers the wages as fixed by the Secretary of Labor.

Under the act of Congress approved August 30, 1935 (U. S. C. A. Title 40; Section 276a–1, Supp. II; 49 Stat. 1011, 1012.), it was provided as follows:

> * * * in the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and to prosecute the work to completion by contract or otherwise * * *

The defendant did not cancel the contract. Plaintiff completed the contract, complying with the decision of the Secretary of Labor from the time it was rendered. After the contract was completed the Comptroller General arbitrarily deducted from the final statement $766.05 on the ground the plaintiff could not benefit by his own wrongful act. There is no provision in the law nor is there a provision in plaintiff's contract permitting a deduction from the contract price by reason of failure to pay the prevailing wages in a locality.

The action of the Comptroller General was unwarranted. Plaintiff is entitled to recover the sum of $766.05. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge,* concur.

WHITAKER, *Judge,* took no part in the decision of this case.

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, ATKINSON-KIER COMPANY v. THE UNITED STATES

[No. 44659. Decided January 8, 1940]

On Demurrer

Government contract; failure to exhaust remedies under contract.—Where each and all of the several counts and claims made in plaintiffs' petition are based upon the action of the contracting officer, and it is nowhere alleged in the petition that the plaintiffs, in accordance with the provisions of the contract, filed any written protest against the instructions or decisions of the contracting officer, or made any written appeal therefrom to the head of the department concerned, or did anything in the way of complying with the provisions of the contract with reference to the decisions of the contracting officer, it is held that as the plaintiffs did not exhaust their remedies under the contract when decisions were rendered against them suit cannot now be maintained.

Same; decision of contracting officer.—It is universally held that if the contracting officer's decision is so palpably erroneous, arbitrary or negligent as to imply want of good faith, it may be impeached and set aside.

Same; legal rights and remedies.—Where the contract provides that the contracting officer's decisions in all disagreements arising out of the contract shall be final, the contractor, it is held, is not thereby deprived of his legal rights and remedies.

Same; general allegations.—Where it is only generally alleged in the petition, and not specifically, that the contracting officer, upon a multitude of occasions, willfully, arbitrarily, and coercively neglected to perform his duties; interfered with, delayed, and prevented plaintiffs' performance of work as required in the contract; refused payment for performance of work not required by the contract; and failed to make payment to plaintiffs in accordance with the provisions of the contract, it is held that such general allegations cannot be considered.

Same; meanings of "willful."—The word "willful" has different meanings.

Same; ministerial duties.—The powers and duties of the contracting officer, where the contract provides that the contracting officer shall decide all disputed questions arising under the contract, are not those of an arbitrator; an arbitrator's proceedings and duties are judicial, or at least semi-judicial in their nature, while the duties of the contracting officer are purely ministerial and involve no judicial functions.

Opinion of the Court

Mr. Samuel T. Ansell for the plaintiffs. *Messrs. R. C. Marshall, III, Burr Tracy Ansell,* and *Samuel T. Ansell, Jr.,* were on the briefs.

Messrs. John B. Miller and *Paul H. Luten,* with whom was *Mr. Assistant Attorney General Francis M. Shea,* for the defendant. *Mr. J. H. Reddy* was on the briefs.

The facts sufficiently appear from the opinion of the court.

GREEN, *Judge,* delivered the opinion of the court:

The petition sets out thirty-one separate causes of action and defendant demurs severally to each thereof. Among other things, the petition alleges in general that the plaintiffs entered into a contract with the defendant to construct a dam in accordance with specifications and supplemental notices made part of the contract. The contract price was stated to be $29,339,301.50. On September 25, 1934, the plaintiffs received notice from the contracting officer of the defendant to proceed with the work provided in the contract. The contract provided that change orders might be made by the defendant. An "Order for Changes No. 1" which plaintiffs received from the contracting officer provided in part that instead of constructing the dam in accordance with the drawings and specifications attached to the contract, the contractor was directed to construct the dam and appurtenant works in accordance with revised designs as shown by attached general drawings. The "Order for Changes No. 1" provided for a structure vastly greater in magnitude and widely different in character and purpose from that provided by the original specifications.

The last paragraph of the "Order for Changes No. 1" provided that "compensation for the work involved as a result of this order shall be made in pursuance of the provisions of paragraph 24 of specifications No. 570 and (or) the provisions of Article 4 of the contract" and limited the time to submit claims for adjustment of compensation to sixty days from the date of the receipt of the order unless the contracting officer for proper cause shall extend such time. Subsequently, the plaintiffs received from the chief engineer a document entitled "Adjustment of Com-

pensation" with which were enclosed typewritten sheets entitled "Specifications Attached and Made a Part of Order for Changes No. 1 in Contract Dated July 16, 1934." The "Adjustment of Compensation" provided *inter alia:*

> Your claim dated August 23, 1935, has been considered and you have been found to be entitled to the following adjustment of compensation.

Twenty-eight additional drawings were attached and a tabulation which set forth the prices to be paid for the new work. Some items under Specifications No. 570 were eliminated, some new items were added, and a large number of items were modified. The "Adjustment of Compensation" was signed by the chief engineer of defendant and had appended the following:

> CHIEF ENGINEER,
> *Bureau of Reclamation, Denver, Colorado.*
> DEAR SIR: Adjustment of the amount of compensation due under the contract and/or in the time required for its performance by reason of the changes above ordered is satisfactory and is hereby accepted.

In December 1935 this was signed by the plaintiffs, the Atkinson-Kier Company, the Silas Mason Company, and the Walsh Construction Company, and in January next was approved by the Commissioner of the Bureau of Reclamation and the Acting Secretary of the Interior.

The petition further alleges:

> While plaintiffs were pursuing the execution of the work as provided in the contract, the contracting officer, upon a multitude of times and occasions, willfully, arbitrarily, and coercively neglected and refused to recognize his obligations and to perform his duties; interfered with, delayed, and prevented plaintiffs' performance of work as provided in the contract; required and refused payment for the performance of work not required by the contract; failed and refused to make payment to the plaintiffs in accordance with the provisions of the contract; and in many and various other ways and with utter disregard of the provisions of the contract and the rights of plaintiffs thereunder wrongfully and tyrannically imposed upon plaintiffs, by reason whereof plaintiffs were caused to suffer great loss and damage.

Following these general allegations, as above stated, the petition sets out thirty-one separate causes of action, all with one exception based on a claim arising out of the contract and work performed in the construction of the dam. We do not think it is necessary to set out specifically each of these separate counts. The wording of any of these counts can easily be ascertained by referring to the petition.

The petition recites that copies of the contract, specifications No. 570, the supplemental notices, schedule and drawings are filed herewith and marked Exhibit "A." Exhibit A is not included in the printed record and it may be questioned whether what is recited above conforms to Rule 12 of this court. We think, however, it is not necessary for us to pass on this question for the reason that both parties in their arguments quote freely from the contract, make reference to the specifications, and appear to be in entire accord as to what is contained therein so far as material to the decision of the demurrer. We think we are accordingly justified in treating these matters as a part of the petition for the purpose of submitting the demurrer.

Paragraph 14 of Specifications No. 570 and Article 15 of the contract are set out in the argument made for defendant. Paragraph 14 provides:

> If the contractor considers any work demanded of him to be outside the requirements of the contract, or considers any record or ruling of the contracting officer or of the inspectors to be unfair, he shall immediately upon such work being demanded or such record or ruling being made, ask for written instructions or decision, * * * and, within ten (10) days after the date of receipt of the written instructions or decision, he shall file a written protest with the contracting officer, stating clearly and in detail the basis of his objections. Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions, or decisions of the contracting officer shall be final and conclusive.

Article 15 of the contract provides:

> ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by

the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions.

The defendant further in argument cites certain parts of specifications No. 570 with reference to the placing, curing, and protection of the concrete and the sand and other materials used in the making of the concrete; also that part of specifications No. 570 which relates to contraction joint sealing strips and the pipe for grouting contraction joints. Other provisions of the specifications are also set out in defendant's argument. As there is no controversy in relation to the wording thereof, these provisions will be treated as supplemental to plaintiffs' petition in considering the defendant's demurrer.

Each and all of the several counts and claims made in the petition are based upon the action of the contracting officer and it is nowhere alleged in the petition that the plaintiffs filed any written protest against the instructions or decisions of the contracting officer, or made any written appeal therefrom to the head of the department concerned, or did anything in the way of complying with the provisions of the contract with reference to the decisions of the contracting officer.

It will be observed that under paragraph 14 of the specifications, if the contractor considers any work demanded of him to be outside of the requirements of the contract, or considers any record or ruling of the contracting officer unfair, he must immediately ask for written instructions or a decision and within ten days file a written protest stating in detail the basis of his objections, and that unless such protests or objections are made in the manner specified, within the time limit stated, the rulings, instructions, or decisions of the contracting officer shall be final and conclusive.

Opinion of the Court

Article 15 of the contract goes still further in requiring that all disputes arising under the contract shall be decided by the contracting officer or his representative, subject only to written appeal by the contractor to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions.

Counsel for plaintiffs characterize these provisions as "vicious" and argue in effect that if applied literally they make the contracting officer, who is an agent of the Government, the final arbiter of practically every question which can arise in the course of the performance of the contract. It is said that the object of these provisions is "to increase departmental power over the contractor and to place the exercise of the power, however erroneous or arbitrary, beyond the power of the courts." This last statement is too broad as it is universally held that if the contracting officer's decision is so palpably erroneous, arbitrary, or negligent as to imply want of good faith it may be impeached and set aside. It is, however, contended on behalf of the plaintiffs that if these provisions are strictly enforced they make the contracting officer the judge of all cases in which a dispute arises and permit him instead of the courts to decide the validity of claims presented by the plaintiff in suits based upon a contract, thus taking away the jurisdiction of the courts and leaving nothing for them to decide. This, it is said, would deprive the plaintiffs of fundamental rights and remedies. The plaintiffs therefore insist that such provisions are invalid and unenforceable.

In support of the argument that the provisions in controversy are invalid, the plaintiffs cite a number of decisions of this court and some by the Supreme Court in contract suits where the plaintiff was permitted to recover notwithstanding certain clauses in the contract, but an examination of these cases shows that in none of them was the same question which is now before the court involved and in each case the judgment was based on facts not appearing in the case at bar.

Among the cases cited by plaintiffs is the *Phoenix Bridge Co.* v. *United States*, 85 C. Cls. 603. This was an action

on a contract under which the plaintiff claimed damages resulting from delay caused by the Government. The facts were quite different from those in the case at bar and the claim set up by the plaintiff was also different from any we find in the case before us. It was held by the court first, that "the contracting officer did not make an independent decision in the free exercise of his own judgment as was clearly contemplated by the contract," and second, that there was no provision in the contract requiring the submission of a claim for delay to the contracting officer.

In *Samuel Plato* v. *United States*, 86 C. Cls. 665, the contract provided that "all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative" subject to appeal. The plaintiff claimed damages because of delay alleged to have been caused by the Government and the court held that a claim for damages arising out of delay on the part of the Government was not such a dispute as was covered by the provision in the contract.

In *Sobel* v. *United States*, 88 C. Cls. 149, the question for determination by the court was again altogether different. The contracting officer was only given authority to decide questions of fact. The opinion does not even allude to any of the controverted principles of law involved in the case before us and it in no way tends to support the contentions of plaintiffs.

In *Davis* v. *United States*, 82 C. Cls. 334, it again appears that the only questions which the contracting officer was authorized by the contract to decide were questions of fact.

It is not necessary to say anything with reference to *McShain* v. *United States*, 88 C. Cls. 284, other than that it has been reversed by the Supreme Court, and the cases cited by the Supreme Court in support of its decision are contrary to the contention made by the plaintiffs as will be shown further on in this opinion.

While there are some expressions in the decisions cited by plaintiffs that taken by themselves and alone might tend to support their contentions, the weight of authority is decidedly to the contrary as will be seen from a considera-

tion of some of the leading cases cited on behalf of defendant.

Bray v. *United States*, 46 C. Cls. 132, 138, was a case in which the decision of the engineer officer was by the contract made final and conclusive upon all matters relating to the work and upon all questions arising out of the specifications, and from his decision no appeal was permitted. There was a dispute over the concrete masonry and the manner of laying it. The contractor protested to the inspector and the local engineer against the way it was required to lay it but made no protest and took no appeal to the engineer officer. The court held that plaintiff could not recover.

Fitzgibbon v. *United States*, 52 C. Cls. 164, 169, went further than the case above cited. The contract authorized the defendant to have an officer in charge of the work and provided that all questions, disputes, or differences as to any part or detail thereof should be decided by such officer, and if such decision should not be acceptable to the contractor the final decision should be made by the Chief of the Bureau of Yards and Docks. The action was begun to recover payment for extra work directed to be performed under the contract and claimed not to be included therein, but it was not alleged that the plaintiff protested against being required to perform this work or ever asked for the decision of the Chief of the Bureau of Yards and Docks as provided by the contract. The petition did, however, aver that the decision of the officer in charge of the particular work therein mentioned was so grossly erroneous as to necessarily imply bad faith. It was held that this allegation does not relieve the plaintiff from the contract obligation of submitting the matter to the Chief of the Bureau of Yards and Docks, that the contractor was under obligation to exhaust his remedy provided in the contract before appealing to the courts for relief, and that when the parties to a contract agree that the decision of an officer shall be final, the court will not set aside such decision, unless the decision is fraudulent or so grossly erroneous that fraud is implied.

Lustbader Construction Co. v. *United States*, 62 C. Cls. 549, followed the case last cited above and held that where

the plaintiff failed to submit its claim in accordance with the provisions of the contract, having failed to pursue the remedy provided for in the contract, it was estopped from asking relief.

In *Kohlman* v. *United States*, 63 C. Cls. 604, 612, the contractor agreed to accept the findings and actions of the Bureau of Yards and Docks as conclusive and binding. Plaintiff did not observe the terms and conditions of this provision but the Government considered his claim. It was held that the decision of the Bureau of Yards and Docks was conclusive and that plaintiff could not recover.

In *Alliance Construction Co.* v. *United States*, 79 C. Cls. 730, 734, the contract contained a provision that all disputes concerning questions of fact should be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the head of the department concerned whose decision should be final and conclusive upon the parties as to such questions of fact. The contractor did not proceed in accordance with this article and it was held that the court was without jurisdiction to consider the action.

Plumley v. *United States*, 226 U. S. 545, is referred to by the Supreme Court as one of the cases upon which the reversal of *McShain* v. *United States*, *supra*, is based. It was held therein that where a contract for government work provides that in case of discrepancies between the specifications and the contract the matter shall be referred to the Secretary of the Department making the contract and the contractor agrees to abide by the decision made thereon, the construction given by the Secretary and his decision are final and conclusive.

There is an allegation in the petition that the contracting officer, upon a multitude of occasions, willfully, arbitrarily, and coercively neglected to perform his duties; interfered with, delayed, and prevented plaintiff's performance of work as required in the contract; refused payment for performance of work not required by the contract; and failed to make payment to the plaintiffs in accordance with the provisions of the contract. But this allegation is only general.

Opinion of the Court

It is not specific and not definite as to which, if any, of the various causes of action set up by plaintiffs it applies. We therefore think it can not be considered in passing upon the demurrer.

In some of the counts it is alleged that the action of the contracting officer was willful, but the word "willful" has different meanings. An examination of the petition by separate counts shows that it is nowhere alleged specifically with reference to the cause of action set up therein that the action or decision of the contracting officer was the result of mistake or fraud so gross as to necessarily imply bad faith.

The twelfth count of the petition shows that the Government agreed to construct a railroad for use in transporting construction materials to the dam site and turn it over to the plaintiffs, and it is alleged that the contracting officer negligently delayed the construction and delivery of the railroad, resulting in damage to the plaintiffs in the sum of $59,889.66, the payment of which has been refused by the contracting officer. An examination of the provision with reference to the railroad shows that the Government did not agree to complete the railroad and turn it over to the contractor at any specified time. Moreover, the matter constituted a dispute arising under the contract, and the contractor took no appeal from the decision made by the contracting officer.

The contract is a harsh one but its language is perfectly plain and we can not reform it.

An argument is also presented by the plaintiffs based on the theory that the language of the contract with reference to the effect of the decision of the contracting officer provides for a proceeding in arbitration. We think this is manifestly erroneous. The powers and duties of the contracting officer under the contract are very different from those of an arbitrator. An arbitrator's proceedings and duties are judicial, or at least semijudicial in their nature. The duties of the contracting officer are purely ministerial and involve no judicial functions. The cases cited above show that provisions similar to those contained in the contract have often been applied by this court and the Supreme

Court without treating them as providing for an arbitration. The decisions cited by plaintiffs with reference to the rule in arbitration cases have therefore no application.

Our conclusion is that the provisions of the contract are valid and enforceable but it is not necessary to so rule in order to sustain the demurrer, as the plaintiffs did not exhaust their remedies under the contract when a decision was rendered against them.

The demurrer must be sustained and the petition dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

JOHN P. SQUIRE COMPANY v. THE UNITED STATES

[No. 44048. Decided January 8, 1940]*

On the Proofs

Processing taxes and export draw-backs.—Where exporter obtained from the United States District Court at Boston, Mass., an injunction restraining the Collector of Internal Revenue at Boston from collecting processing taxes from the exporter, it is held that the injunction restrained only the collector and did not apply to the Comptroller General and did not preclude the Comptroller General from setting off the amount thereof against exporter's claim for export draw-back refund under the Agricultural Adjustment Act.

Same.—The credit by the Comptroller General of the export draw-back refunds previously allowed by the Commissioner of Internal Revenue against outstanding processing taxes due by the exporter was in all respects legal, proper, and timely when made; and such credit constituted a collection, to that extent, of the processing taxes then owing by the exporter; so that the exporter's remedy after the Agricultural Adjustment Act was declared unconstitutional was not by an action for recovery of the export refund but was by claim for refund of the processing taxes, so collected, under sections 902, 903, 904, and 906 of the Revenue Act of 1936.

*Certiorari denied, April 22, 1940.

Reporter's Statement of the Case

Same; account stated.—Where credit by Comptroller General of export draw-back refunds previously allowed by the Commissioner of Internal Revenue against outstanding processing taxes then due by exporter left no balance in favor of the exporter, action to recover the export draw-back refunds could not be maintained as on an account stated.

The Reporter's statement of the case:

Mr. W. Parker Jones for the plaintiff.

Mr. Guy Patton, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

Plaintiff seeks to recover $82,662.87 as the amount of an export refund due it on account of processing taxes paid on processed hog products which were exported to foreign countries. The products so exported by plaintiff and its predecessor had been processed by others and the processing tax imposed under sections 16 (a) and 9 (a) of the Agricultural Adjustment Act had been paid by the processors.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a corporation organized under the laws of the Commonwealth of Massachusetts, with its principal office in the City of East Cambridge in said Commonwealth, and at all times mentioned herein was engaged in the processing and sale of meats and meat products, including hog products for foreign and domestic commerce.

On March 5, 1934, plaintiff acquired by purchase all the property and assets, including all bills and accounts receivable and all claims and demands of North Packing & Provision Company, a corporation theretofore doing business under its own name and under the trade name of White, Pevey and Dexter Company, and engaged in the processing and sale of meats and meat products, including hog products for foreign and domestic commerce. Thereafter plaintiff continued the aforesaid business in its own name and, from time to time, under the trade names, regis-

tered according to law, of North Packing & Provision Company, and White, Pevey and Dexter Company.

2. During the period from November 4, 1933, to March 5, 1934, inclusive, North Packing & Provision Company, under its own name and under the trade name of White, Pevey and Dexter Company, exported quantities of hog products to England and other foreign countries, upon which the floor stocks and/or processing taxes, imposed under Secs. 16 (a) and 9 (a) of the Agricultural Adjustment Act (U. S. C. Supp. III, Title 7, Secs. 616 and 609), had been paid by the holders and processors, respectively.

During the period from March 5, 1934, to December 31, 1934, inclusive, plaintiff, under the trade names of North Packing & Provision Company and White, Pevey and Dexter Company, exported quantities of hog products to England and other foreign countries upon which the floor stocks and/or processing taxes, imposed under Sections 16 (a) and 9 (a) of the Agricultural Adjustment Act (U. S. C. Supp. III, Title 7, Secs. 616 and 609), had been paid by the holders and processors, respectively.

The floor stocks and processing taxes paid by the holders and processors of said hog products amounted, in the case of the products exported by North Packing & Provision Company and by plaintiff under the trade name of North Packing & Provision Company, to $68,523.46, and in the case of the products exported by North Packing & Provision Company under the trade name of White, Pevey and Dexter Company and by plaintiff under the trade name of White, Pevey and Dexter Company to $14,139.41. The taxes so paid were not included in the prices charged by the exporters and were not collected in any way from any of the purchasers of the hog products exported as aforesaid. No credit or refund has been allowed to any person other than plaintiff with respect to the said taxes.

3. Plaintiff duly filed claims for refund of the aforesaid floor stocks and processing taxes in the names of North Packing & Provision Company and White, Pevey and Dexter Company in the respective amounts set forth in finding 2 hereof in accordance with the regulations of the Commissioner of Internal Revenue and the provisions of

Section 17 (a) of the Agricultural Adjustment Act, as amended (U. S. C. Supp., Title 7, Sec. 617), and made proof of exportation of said hog products and the payment of the aforesaid taxes applicable thereto.

4. During the months of September, October, November, and December, 1934, the Commissioner of Internal Revenue allowed the claims for refund and issued checks payable to North Packing & Provision Company in the aggregate amount of $68,523.46, and to White, Pevey and Dexter Company in the aggregate amount of $14,139.41, and transmitted the checks to the Collector of Internal Revenue at Boston, Massachusetts, and plaintiff was advised thereof.

5. The collector refused to deliver the checks to plaintiff herein and, instead, returned same to the General Accounting Office at Washington during November and December 1934, and January 1935, and at the same time advised plaintiff by letters in respect to each and every claim that it had come to his attention that on March 5, 1934, North Packing & Provision Company had sold its assets to John P. Squire Company and his office was not permitted to release a check to a corporation which had been taken over or absorbed by another corporation. By said letters the collector further advised plaintiff that the checks had been returned to the Bureau at Washington for lawful disposition and that application for same should be made to the General Accounting Office, Claims Division, Washington, D. C. The letters are in evidence as exhibits A and B and are made a part hereof by reference.

6. Proof of ownership by plaintiff of the aforesaid checks was furnished to the General Accounting Office, but the Comptroller General refused to deliver same to plaintiff. Instead, the checks were canceled by the Comptroller General and the total amount thereof was transferred from the official balance of the drawer and covered into the Treasury of the United States on December 18, 1935, as collections on account of outstanding processing taxes appearing against the plaintiff herein for the months of May and June 1935, in the respective amounts of $148,608.85 and $163,743.15, and for subsequent months. On December

13 and December 27, 1935, the Comptroller General issued certificates of deposit in the respective sums of $76,445.75 and $6,217.12 to the credit of the collector at Boston.

7. On August 7, 1935, prior to the aforesaid action of the Comptroller General in offsetting said checks against outstanding processing taxes appearing against the plaintiff and the issuance of the certificates of deposit aforesaid, plaintiff had obtained a preliminary injunction against William M. Welch, individually and as Collector of Internal Revenue for the District of Massachusetts, restraining the collector at Boston from collecting from plaintiff taxes amounting to $312,352 for the processing of hogs during May and June 1935, and from collecting from plaintiff any other taxes under the Agricultural Adjustment Act. At the time the Comptroller General canceled the checks and applied the amounts thereof as a credit against the outstanding processing taxes, he had not been advised by the collector at Boston, or by the Commissioner of Internal Revenue, that the preliminary injunction had been granted and was outstanding and in force and effect, but had been so advised by plaintiff on September 13, 1935.

8. The preliminary injunction was issued by the United States District Court for the District of Massachusetts in an action entitled "John P. Squire Company v. William M. Welch, individually and as Collector of Internal Revenue for the District of Massachusetts, in equity No. 4179." The preliminary injunction was issued upon condition that plaintiff make and file with the clerk of said court a bond in the principal sum of $312,352, covering the alleged processing tax due for the months of May and June 1935, and a like bond in an amount equal to the alleged processing taxes as shown in the returns filed by plaintiff for each month, as and when such processing tax is alleged by the defendant to become due. Plaintiff had furnished to the court a good and sufficient bond, approved by the court, providing for the payment of any processing taxes which it might become obligated to pay if the processing taxes should be held to be valid. The injunction continued in full force and effect until January 6, 1936, when the Supreme Court of the

United States held the Agricultural Adjustment Act to be unconstitutional (*United States* v. *Butler*, 297 U. S. 1). A copy of the preliminary injunction is in evidence as Exhibit C, and is made a part hereof by reference.

9. At the time the Comptroller General covered the amounts of the foregoing taxes into the Treasury by off-sets as aforesaid, and at the time of his issuance of the certificates of deposit, there were no taxes or any obligations to the United States outstanding against plaintiff, or claimed to be outstanding, other than hog processing taxes, including said sum of $312,352. Monthly returns of hogs processed by plaintiff and bonds for the payment of processing taxes thereon, as required by said preliminary injunction, were filed by plaintiff for all periods prior to January 6, 1936.

10. The action taken by the collector at Boston is set forth in the Commissioner's letter of March 27, 1936, to the Comptroller General, as shown in Exhibit E attached to plaintiff's petition herein.

The action taken by the Comptroller General is likewise set forth in his letter to the Secretary of the Treasury of May 22, 1936, as shown in Exhibit E attached to plaintiff's petition herein.

11. Upon the enactment of the Revenue Act of 1936 (U. S. C. Supp. III, Title 7, Sec. 641), plaintiff refiled its aforesaid claims with the Commissioner of Internal Revenue, which claims were rejected by the Commissioner upon the ground that they were duplicates of claims which the Commissioner had allowed, and that the set-off made by the Comptroller General of the checks issued in settlement of the claims originally filed was, in fact, payment of these claims.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The amount of $82,662.87, which plaintiff herein seeks to recover, represents the export drawback refund which the Agricultural Adjustment Act authorized to be made upon proof of exportation to a foreign country of products

subject to the processing tax imposed by that act. Certain of the products were exported by plaintiff's predecessor between November 4, 1933, and March 5, 1934, and the others were exported by plaintiff between March 5 and December 31, 1934. Thereafter plaintiff duly filed claims for the export drawback refunds of the amounts of the floor stocks and the processing taxes imposed by the Agricultural Adjustment Act upon the products so exported by plaintiff and its predecessor. These refund claims were filed in 1934 by plaintiff in accordance with the regulations of the Commissioner of Internal Revenue and the provisions of section 17 (a) of the Agricultural Adjustment Act as amended, U. S. C. Supp. III, Title 7, Section 617. Plaintiff made proof of the exportation of the product and of the payment by the processors of the floor stocks and the processing tax applicable thereto. Between September and December, 1934, the Commissioner of Internal Revenue allowed the claims for the export drawback refunds on account of the processing taxes, aforesaid, and issued checks therefor payable to the North Packing & Provision Company and the White, Pevey and Dexter Company, in whose names the products had been exported by such companies, and by plaintiff as successor thereto. The Commissioner transmitted these checks to the collector at Boston, Massachusetts. Upon receipt of these drawback refund checks, the collector returned the same to the Comptroller General during November and December, 1934, and in January 1935, and advised plaintiff that this was being done for the reason that he was not permitted to release the checks issued in the name of the other corporations which had been taken over by plaintiff, and that plaintiff should make application for the refund checks to the Comptroller General. Thereafter plaintiff furnished to the General Accounting Office proof of the circumstances under which it acquired all the properties of the corporations to which the refunds had been allowed on claims filed by plaintiff. Before the export drawback refund checks were delivered by the Comptroller General, further processing taxes imposed by the Agricultural Adjustment Act became due from plaintiff, who was also a processor, and were unpaid for the months of May

and June 1935 in the respective amounts of $148,608.85 and $163,743.15, and for subsequent months. For this reason the Comptroller General canceled the refund checks totaling $82,662.87 and transferred that amount from the official balance of the drawer and the same was covered into the Treasury of the United States on December 18, 1935, as a credit against and collection of the outstanding and unpaid processing taxes appearing against the plaintiff for the month of May 1935.

While the checks for the refunds allowed by the Commissioner were in the hands of the Comptroller General, but before the Comptroller on December 13 and December 17, 1935, canceled the checks and issued certificates of credit thereof to the unpaid processing tax, plaintiff, on August 7, 1935, in a suit against the collector of revenue at Boston, Massachusetts, had obtained from the United States District Court a preliminary injunction against the collector restraining him from collecting from plaintiff processing taxes amounting to $312,352 for hog products processed during the months of May and June, 1935, and from collecting from plaintiff any other taxes under the Agricultural Adjustment Act.

Plaintiff bases its right to recover the export drawback refunds on the ground that the set-off, or credit, by the Comptroller General was unlawful because it had obtained an injunction against the collector restraining him from collecting the processing tax and had given a bond in the District Court for Massachusetts for the accrued and unpaid processing tax. This position cannot be sustained. The preliminary injunction restrained only the collector of revenue at Boston from collecting any processing taxes due from plaintiff under the provisions of the Agricultural Adjustment Act. The injunction by its own terms shows that it did not apply to the Commissioner of Internal Revenue or to the Comptroller General for it recognizes that credits, in respect of the processing taxes which it restrained the collector from collecting, might be made by these officials. Moreover, the District Court could not have effectively enjoined these officials from making authorized credits for the reason that they were not within the jurisdiction of the

court. Moreover, the Court had no control and did not attempt to exercise any control over the disposition of any refund that might be due plaintiff. The preliminary injunction so far as it related to credits in respect of processing taxes unpaid at the date of the injunction, or thereafter becoming payable, was as follows:

> This injunction is granted upon the condition that the plaintiff shall give and file with the Clerk of this Court a bond with surety acceptable to this Court, the penalty of which shall be in the principal sum of $312,352, covering the alleged processing taxes due for the months of May and June 1935, and a like bond in the principal amount equal to the alleged processing taxes as shown in the return filed by the plaintiff for each month if and when such processing tax is alleged by the defendant to become due, on or before one day after each of such due dates, and the continuation of said preliminary injunction as to said taxes, penalties, and interest for months subsequent to June 1935, shall be conditioned upon the giving by the plaintiff of such additional bond.
>
> And upon the further condition that the plaintiff shall, without prejudice, each month, at the time and in the manner provided in the said Agricultural Adjustment Act, and the regulations issued thereunder, file a monthly return showing the number and weight of hogs processed by the plaintiff each month, together with a computation of the amount of the alleged processing tax thereon, with the defendant and with the Clerk of this Court, and will file with the Clerk of this Court a surety bond as hereinabove provided in the principal amount of said monthly installments of alleged processing tax, less such amount or amounts as the Commissioner of Internal Revenue may have abated, credited or set off against any of said alleged processing taxes, and less any further sum that the Comptroller General or the General Accounting Office may have set off against any of said processing taxes.

The credit by the Comptroller General of the export drawback refunds previously allowed by the Commissioner was in all respects legal, proper, and timely when made, and such credit, when made, constituted a collection, to that extent, of the processing taxes then owing by plaintiff. Since the processing taxes, as so satisfied by the credit, were

Syllabus

at the time outstanding against plaintiff and unpaid, and were collectible by such credit, plaintiff's remedy in the premises is by claim for refund of the processing taxes so collected under sections 902, 903, 904, and 906, Title VII of the Revenue Act of 1936, 49 Stat. 1648, 1747.

Plaintiff's claim that it is entitled to maintain this suit and to recover the export drawback refund on an account stated cannot be sustained. Under section 305 of the Budget and Accounting Act of 1921 (42 Stat. 20, 24), the Comptroller General possessed authority to adjust and settle the accounts between the Government and the plaintiff when the matter reached him through the return of the checks by the collector. When these accounts were adjusted, the account, as stated, showed no balance in favor of plaintiff. The petition must, therefore, be dismissed. It is so ordered.

WHITAKER, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WILLIAM W. BRUNSWICK v. THE UNITED STATES

[No. 44629. Decided January 8, 1940]

On the Proofs

Retired pay of Foreign Service officer.—Where a Foreign Service officer, retired for disability under the act of May 24, 1924, as amended by the act of February 23, 1931, and drawing retired pay, was subsequently employed at different times in three temporary positions in the executive branch of the Government, it is held that he is not prohibited from drawing both the salary of such temporary position and the annuity as a retired Foreign Service officer.

Same; double salary.—In the instant case, there is no question of "double salary," but only one salary and one annuity.

Same; retired pay not salary.—"Retired pay" does not constitute salary, but is in the nature of an annuity.

Same; annuity and salary.—There is no statutory provision against plaintiff receiving an annuity under the Foreign Service Act and being employed at the same time in a temporary position not under that act.

Same; no limitations on annuities.—Congress has placed no limitation on annuities granted under the Foreign Service Act.

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The Reporter's statement of the case:

Mr. Huston Thompson for the plaintiff. *Mr. Herbert S. Ward* was on the briefs.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court, upon a stipulation of the facts and the evidence, made the following special findings of fact:

1. Plaintiff was deputy Consul and Clerk in the Foreign Service of the United States on April 24, 1907. The Foreign Service of the United States was created under the Act as of May 24, 1924, Chapter 182, Section 1, 43 Stat. 140, which Act provided for the reorganization and improvement of the Foreign Service and, among other things, for a classification of employees on the roll of the Foreign Service. Plaintiff was appointed to the position of Foreign Service Officer under Section 3, Class 8, of this Act at a salary of $3,500 per annum, in which position he continued until August 31, 1932.

2. On August 31, 1932, plaintiff was retired for disability under the provisions of Section 26 (j) of the Act of February 23, 1931 (46 Stat. 1207, 1212), amending Section 18, subparagraph M of the Act of 1924, *supra*, with a retirement pay of $1,623.12, and his retirement pay has continued to be said sum per annum.

On May 9, 1935, plaintiff was employed by the National Emergency Council as a Correspondence Dictator for a temporary period ending June 30, 1935, at a daily wage of $7.00, the total amount received for said services being $315. This appointment was in nowise connected with or under the Civil Service of the United States.

3. On February 17, 1936, plaintiff was employed as Correspondence Clerk in the Resettlement Administration of the United States at a salary of $1,620 per annum, the position being in nowise connected with or under the Civil Service. Plaintiff held this position until August 3, 1936, when he was appointed Assistant Fiscal Accounting Clerk (EO–5) for emergency work in the office of the Commission of Accounts and Audits of the Treasury Department of the

United States, with compensation at the rate of $1,620 per annum, which position he continues to hold and the same being in nowise connected with or under the Civil Service. At no time since retirement has plaintiff received pay for services rendered beyond the sum of $1,620 per annum.

4. The Comptroller General of the United States has caused to be withheld from, and has refused to pay plaintiff his retirement pay from August 1, 1936, to date of filing the petition herein, March 10, 1939, and ever since said date.

5. Defendant has filed a counter-claim herein against plaintiff in the sum of $1,582.55 for moneys which it is alleged plaintiff received from the retirement fund accumulated under the Act of 1924, as amended by the Act of 1931, while the plaintiff was drawing salary under the above referred to appointments, which money defendant claims is due and owing by the plaintiff to defendant. Plaintiff admits that the amount was paid to him from the retirement fund during said time.

The court decided that the plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

Plaintiff was retired as a Foreign Service officer, for disability, on August 31, 1932, on an annuity or retired pay of $1,623.12 per annum.

Subsequent to retirement plaintiff was employed, on May 9, 1935, by the National Emergency Council, for a temporary period ending June 30, 1935, at a daily wage of $7, the total amount received for such services being $315; on February 17, 1936, plaintiff was temporarily employed in the Resettlement Administration, at $1,620 per annum, and held that position until August 3, 1936, when he was appointed Assistant Fiscal Accounting Clerk for emergency work in the office of the Commissioner of Accounts and Audits, Treasury Department, with compensation of $1,620 per annum, which position he continues to hold; these temporary appointments held by plaintiff being in nowise connected with or under the rules of the United States Civil Service, and the compensation received by plaintiff for such services being at no time in excess of $1,620 per annum.

The Comptroller General of the United States has caused to be withheld from and has refused to pay plaintiff his retirement pay from August 1, 1936, to the date of the filing of the petition herein and since that time. During the period in which plaintiff was receiving compensation for his services in the various employments stated, he was paid $1,582.55 from the retirement fund accumulated under the Act of 1924, as amended by the Act of 1931, for which sum the defendant has filed a counterclaim herein, claiming that that amount is due and owing by plaintiff to the defendant.

The question for decision is whether plaintiff is entitled to receive his retirement pay as a Foreign Service Officer during the period he was receiving compensation for services in the three temporary positions held by him in the executive branch of the Government.

The first Civil Service Retirement Act became a law May 22, 1920, 41 Stat. 614. Under this Act officers of the Foreign Service of the United States were placed in the classified civil service under section 2 of the Act and became eligible for retirement on an annuity as provided in sections 2 and 3. There is nowhere in the Act any provision prohibiting a retired Foreign Service Officer on an annuity from accepting compensation for services rendered in a temporary position in another division of the Government and drawing salary therefrom without being reduced in his annuity.

By the act of May 24, 1924, 43 Stat. 140, the President was authorized to prescribe rules and regulations for the establishment of a Foreign Service Retirement and Disability System to be administered under the direction of the Secretary of State. By this Act Foreign Service employees of the State Department who had theretofore been included under the Classified Civil Service Act of 1920 were removed therefrom and placed under a retirement system administered under the direction of the Secretary of State. Foreign Service employees of the State Department thus passed from classified civil service control and were enrolled under the new Foreign Service Act. This Act contained the following provision:

> (m) Whenever any Foreign Service officer, after the date of his retirement, accepts a position of employment the emoluments of which are greater than the annuity

> received by him from the United States Government by virtue of his retirement under this Act, the amount of the said annuity during the continuance of such employment shall be reduced by an equal amount:

It was intended by this provision to "discourage the practice of retired officers drawing Government annuities while earning large salaries in business." (Report of the Committee on Foreign Affairs of the House of Representatives, No. 157, 68th Congress, 1st Session). The provision was omitted from the act of February 23, 1931, U. S. C. A. Title 22, Section 21 (j), amending the Foreign Service Act of May 24, 1924, for the reasons stated by the managers on the part of the House conferees in Conference Report No. 2702, House of Representatives, 71st Congress, 3rd Session, accompanying the bill in its passage through the House and Senate:

> And (e) elimination of the present provision of law (m) would prevent retired officers from obtaining employment with salaries in excess of their annuities which is a particular hardship upon retired officers with low annuities.

It appears therefore that this provision, the only limitation ever placed by Congress on an annuity, had ceased to be a part of the law before the plaintiff's retirement on August 31, 1932. In no event, however, would the limitation, even if in effect, be applicable to the plaintiff as the emoluments to him from the various positions held have never been more than $1,620, therefore less than his retirement allowance.

The defendant relies largely on section 58, Chapter 1, Title 5, U. S. C. A., which makes provision for double salaries:

> Unless otherwise specifically authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary when the combined amount of said salaries exceeds the sum of $2,000 per annum

and contends that this statute is controlling in the case at bar, and that plaintiff is precluded thereby from receiving his retired pay in the amount of $1,623.12, and his salary for services contemporaneously rendered the defendant amounting to approximately $1,620 per annum.

Opinion of the Court

We do not agree with the defendant in this contention. We are not here dealing with "double salaries" but with one salary and one annuity, which the courts have held are entirely different things. In *Calhoun* v. *United States*, 66 Ct. Cls. 545, 549, the court was called upon to consider section 4 of the act of August 24, 1912, 37 Stat. 560, 561, establishing a permanent organization for the Panama Canal, which provides:

> If any of the persons appointed or employed as aforesaid shall be persons in the military or naval service of the United States, the amount of the official salary paid to any such person shall be deducted from the amount of salary or compensation provided by or which shall be fixed under the terms of this Act.

The question for determination by the court was whether or not the provisions of this statute were meant to apply to a retired enlisted man. The court said:

> We are of the opinion that the language used in the act of 1912 clearly indicates that the act was not intended to apply to retired enlisted men. It will be noted "that the amount of official salary paid to any such person shall be deducted * * *." "Salary," as defined in the Standard Dictionary, is a "periodical allowance made as compensation to a person, for his official or professional service, or for his regular work." Salary is current pay to a person *for his regular work*. Retired pay is not compensation for service performed. As used in the military and naval service, retired pay is a gratuity given in worthy cases in recognition of past services, for which no service whatever is rendered, and is usually in a sum less than the active-service pay. Essentially, it is a pension.
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> * * * * *
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> We have reached the conclusion that the pay received by retired enlisted men in the military or naval service of the United States is not *official salary* as that term is used in the act of August 24, 1912.

In *Geddes* v. *United States*, 38 Ct. Cls. 428, the court construed the provision in the act of March 3, 1885, 23 Stat. 353, 356, which reads:

> That no part of the money herein or hereafter appropriated for the Department of Agriculture shall be paid

to any person, as additional salary or compensation, receiving at the same time other compensation as an officer or employee of the Government.

The claimant was chief clerk of the Department of Agriculture. While holding that position he was appointed and commissioned a captain of infantry in the United States Army from which position, under a special act of Congress, he was immediately retired. Subsequent to his retirement he had received his pay as chief clerk of the Department of Agriculture but had not received pay as a retired officer of the Army. The question submitted to the court was whether he was entitled under that Act in question to both the salary of the office of chief clerk and his pay as an officer on the retired list. The court in deciding that plaintiff was entitled to recover said:

> To bring a retired officer of the Army within the inhibition of the statute it is plain that he must be an "officer or employee of the Government" within its intent; that his unofficial life after retirement must be regarded, within the intent of the statute, as service; that his three-fourths retired pay must be "salary or compensation" for such service. It is well settled that an officer on the retired list owes no service to the Government in time of peace; that if called into service in time of war he returns thereby to the active list and receives full pay; that there is but one military office which he can hold—that of Superintendent of the Soldiers' Home; and that his reduced retired pay is but an honorary form of pension to be paid him when, having reached a certain age, it is presumed that he is no longer well fitted to render active service to the Government. (*Hayden's case*, ante, p. 39; *Act 2d March*, 1899, 30 Stat. L., p. 977, sec. 7). If this officer on the retired list had been rendering service to the Government, and if his retired pay was intended as "compensation" for that service, and if the Secretary of Agriculture had intended to give to this retired officer "additional compensation," to be paid out of the funds of his Department, the case would come within the purview of the statute. But there must be "compensation" received before there can be "additional compensation" prohibited. As a matter of fact, the pay of a retired officer is not compensation; and it follows as a matter of law that the salary of the chief clerk of the Department of Agri-

culture was not "additional compensation." The act of 1885, therefore, does not control the case.

The Supreme Court has said that a statute prohibiting an officer from receiving more than one salary cannot "by fair interpretation be held to embrace an employment which has no affinity or connection, either in its character or by law of usage, with the line of his official duty, and where the service to be performed is of a different character and for a different place, and the amount of compensation regulated by law." *Converse* v. *United States* (21 How., 463); *United States* v. *Brindle* (110 U. S., 688, 694); and this court has held ever since *Collins's Case* (15 C. Cls. R., 22, 40) that the pay of a retired officer "is not given as compensation for discharging the duties of any office during the period for which it is to be paid, but rather as a bounty and in the nature of a pension for services to his country previously performed."

If the retired pay of an officer of the Army or Navy does not constitute salary, as these decisions hold, how much less can it be successfully contended that the retired pay of a Foreign Service officer, such as plaintiff in this case, constitutes salary? Plaintiff before his retirement had contributed part of his earned salary to the Foreign Service Retirement Fund toward the payment of the annuity awarded to him upon retirement. In other words, part of his retired pay was taken from his earned salary in advance of his retirement, just as one pays in advance for a life insurance policy. The rest of his retired pay was a gratuity, or, as stated by the court in *Geddes* v. *United States*, *supra*, an "honorary form of pension." The annuity granted plaintiff upon his retirement did not constitute salary within the meaning of the statute, hence the contention of the defendant that plaintiff is precluded from recovering by the provisions of paragraph 58, Chapter 1, Title 5, U. S. C. A., cannot be sustained.

The defendant concedes that there is no statutory prohibition against plaintiff receiving an annuity under the Foreign Service Act and being employed in a temporary position not under the Foreign Service, but maintains that without affirmative legislative action plaintiff cannot draw service compensation simultaneously with his annuity. The

Comptroller General, to whom the instant case was referred, 16 Comp. Gen. 121, said:

> There is no prohibition of law against the reemployment in the executive civil service of a former Foreign Service officer—who has not attained the age for automatic retirement—retired for disability, but his retirement annuity may not be paid concurrently for the period of such employment.

The opinion of the Comptroller General was based on prior decisions rendered by him and by his predecessor, the Comptroller of the Treasury, in cases arising under acts of Congress other than the Foreign Service Act of May 24, 1924, as amended. We have examined these cases and are of the opinion that they have no application to either the facts or the law of the instant case. In the first place it is conceded that there is no statutory provision against plaintiff receiving an annuity under the Foreign Service Act and being employed at the same time in a temporary position not under that Act, and in the second place it is clear that Congress has placed no limitation on annuities granted under the Foreign Service Act. That Congress intended that annuitants under that Act should be paid their annuities in full is clearly indicated by the fact that Congress having originally placed a limitation on such annuities, and after 7 years of trial, realizing the burden it had put upon poor men in the Foreign Service with small annuities and no other means of livelihood, wiped out the limitation entirely in the amendatory act of February 23, 1931, because the limitation was a "particular hardship on retired officers with low annuities."

Congress having refused to place a limitation on annuities granted under the Foreign Service Act of May 24, 1924, as amended, the court is without authority to do so. It is therefore held that plaintiff is entitled to recover the full amount of his claim. Judgment is awarded in the sum of $4,233.65, and the counterclaim is dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

GEORGE S. WOLBERT, RECEIVER OF THE NEAFIE & LEVY SHIP AND ENGINE BUILDING COMPANY v. THE UNITED STATES

[No. 15009 Congressional. Decided January 8, 1940]

On the Proofs

Reimbursement of loss suffered in the construction of three torpedo-boat destroyers.—In response to the reference by the Senate of the United States, it is found by the Court that the actual cost to the contractors of the construcion of the *Bainbridge*, *Barry*, and *Chauncey* was $974,083.94 and that the amount received from the Government was $870,262.38, or a loss of $103,821.56.

Same.—Plaintiff's claim for reimbursement is neither a legal nor an equitable one in a juridical sense, and compensation for such loss rests entirely in the discretion of Congress.

The Reporter's statement of the case:

Mr. Frank F. Nesbit for the plaintiff. *Mr. Justin L. Edgerton* was on the briefs.

Mr. Assistant Attorney General Francis M. Shea for the defendant. *Messrs. Arthur Cobb* and *William W. Scott* were on the brief.

The court made special findings of fact, as follows:

1. This is a claim for reimbursement of loss suffered in the construction under the Act of May 4, 1898 (30 Stat. 369), of three torpedo-boat destroyers known as the *Bainbridge*, the *Barry*, and the *Chauncey*.

There was introduced in the United States Senate June 6, 1910, 61st Congress, 2nd Session, a bill known as S. 8533, for the relief of certain government contractors, builders of torpedo boats and torpedo-boat destroyers, authorized by the aforesaid Act of May 4, 1898. Included among the contractors named therein was the Neafie & Levy Ship and Engine Building Company, now represented herein by its Receiver, George S. Wolbert, for which the bill proposed to appropriate $371,066.37, as the difference between the actual cost of construction and the amount paid under the contract of the Neafie & Levy Ship and Engine Building Company.

Reporter's Statement of the Case

Omitting the names of contractors other than the company involved herein, the bill reads as follows:

> For the relief of certain government contractors. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:* That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to the hereinafter-named builders of the twelve torpedo boats and sixteen torpedo-boat destroyers, authorized by the Act of Congress making appropriations for the naval service approved May fourth, eighteen hundred and ninety-eight, the following sums, namely, * * * Neafie and Levy Ship and Engine Building Company, of Philadelphia, Pennsylvania, three hundred and seventy-one thousand and sixty-six dollars and thirty-seven cents; * * * being the difference between the actual cost of said boats to their respective builders and the amount paid them under their contracts.

Senate Resolution 269 of June 21, 1910, 61st Congress, 2nd Session, referred this claim, among numerous others, to this Court, as follows:

> *Resolved*, That the claims * * * of certain Government contractors (S. 8533) * * * now pending in the Senate, together with all accompanying papers, be, and the same are hereby, referred to the Court of Claims, in pursuance of the provisions of an act entitled "An Act to provide for the bringing of suits against the Government of the United States," approved March third, eighteen hundred and eighty-seven, and commonly known as the Tucker Act. And the said Court shall proceed with the same in accordance with the provisions of such act and report to the Senate in accordance therewith.

2. The Neafie & Levy Ship and Engine Building Company, hereinafter termed The Company, is a corporation of the State of Pennsylvania incorporated March 5, 1891. The Company was placed in receivership in the Court of

Common Pleas No. 5 of Philadelphia County, Pennsylvania, in 1904 and John W. Grange and Somers N. Smith were appointed receivers thereof; on February 25, 1908, Howard E. Cornell was appointed as sole receiver. On December 4, 1911, in the name of The Neafie and Levy Ship and Engine Building Company, as plaintiff, the petition in this cause was filed by Howard E. Cornell who signed the petition as receiver; on July 6, 1927, the Court made an order substituting Howard E. Cornell, Receiver, as plaintiff.

On March 22, 1939, Howard E. Cornell died and was succeeded by George S. Wolbert as receiver, who was substituted as plaintiff herein by the court on June 27, 1939.

3. The Naval Appropriation Act of May 4, 1898 (30 Stat. 369, 389), provided for and authorized certain increases in the naval establishment, among which was the construction of "sixteen torpedo-boat destroyers of about four hundred tons displacement, and twelve torpedo boats of about one hundred and fifty tons displacement, to have the highest practicable speed, and to cost in all, exclusive of armament, not exceeding six million nine hundred thousand dollars"; it was by the act further provided that not more than five of the destroyers and not more than four of the torpedo boats should be built in one yard or by one contracting party; that the contracts for destroyers and torpedo boats might be let after three weeks' advertisement and that in all their parts, including steel, the vessels should be of domestic manufacture.

On May 4, 1898, the Navy Department issued a circular defining the general requirements for the machinery of the torpedo boats and torpedo-boat destroyers authorized by said Act of May 4, 1898, and on May 16, 1898, a circular defining their chief characteristics. In the circular of May 16, 1898, it was stated that an advertisement would be published later, calling for the construction of the vessels in accordance with plans and specifications (class 1) provided by the Navy Department and (class 2) submitted by the bidder, and, further, that a bidder on his own design could adopt and incorporate therein any part of the Navy Department's plans; it was further provided that the maxi-

mum prices allowable would be for the torpedo boats $170,-000.00 and for the torpedo-boat destroyers $295,000.00, and that there would be reserved on each boat $5,000.00 to cover expenses chargeable to the appropriation but not included in the contract prices. The aggregate of the maximum prices fixed by the circular and the reservations equals the limit of $6,900,000.00 provided by the act.

In due course a copy of the above-mentioned circulars, together with an accompanying letter stating that the Navy Department's hull plans and specifications would be ready the following July, was received by The Company.

On July 13, 1898, the Secretary of the Navy advertised for bids for the construction of the vessels. In the advertisement it was provided that no bids in excess of the prices mentioned would be entertained for the construction of the vessels; that the torpedo-boat destroyers should have a displacement of approximately 420 tons and a speed of not less than 29 knots; that construction thereof should be completed within 12 months; that copies of the formal proposal and contract and the Navy Department's plans and specifications would be available after July 18, 1898, and that proposals would be entertained for the construction of vessels upon either the plans and specifications of the Navy Department (class 1), or the builder's plans and specifications (class 2).

4. The Navy Department fixed the maximum or upset price at which bids would be considered after it had estimated the costs, and such price was intended to allow, and usually did allow, a fair return to the contractor for his work.

Officers of the Navy Department believed that the prices fixed in the advertisement for the torpedo boats were fair and reasonable and that a profit would accrue to the builders.

Prior to the times involved herein the Navy Department had not built any torpedo-boat destroyers of the size called for by this contract and the construction of torpedo-boat destroyers of this size and design had not previously been attempted in the United States.

5. The Company had had no prior experience in constructing torpedo-boat destroyers or torpedo boats of any

kind and had done no work for the Navy except that its predecessor in business had built Naval vessels at about the time of the Civil War. The Company's experience had been limited to building of tugboats, river steamers, coasting steamers, and other similar merchant vessels.

Before submitting its bid The Company had secured the advertisement and general arrangement plans of the Navy Department relating to the proposed torpedo-boat destroyers and had available the published costs of such torpedo boats as had already been built for the Navy Department. It did not have the cost of torpedo-boat destroyers that had been built in England and France or any information as to the cost of building torpedo-boat destroyers of this size, speed, and displacement. The advertised plans were general arrangement plans and embodied no detail plans and these were to be worked out later, and in the absence of final detail plans made or adopted and approved by the Government, afforded no means of accurately forecasting the final cost.

6. The Company on August 1, 1898, submitted to the Navy Department a bid for the construction of three torpedo-boat destroyers at a unit price of $283,000.00. The bid was accepted and contracts awarded The Company for the construction of three torpedo-boat destroyers on September 23, 1898, known as No. 1 the *Bainbridge*, No. 2 the *Barry*, and No. 3 the *Chauncey* on the Department's plans.

7. On October 1, 1898, three contracts, identical except for the name of the vessel, were entered into between The Company, represented by its President, and the United States, represented by the Secretary of the Navy.

Each contract provided, with other matters not necessary here to detail, the contractor was to construct in accordance with the drawings, plans, and specifications required by the Act of May 4, 1898, "one torpedo-boat destroyer of about 420 tons displacement," with fittings, the vessel, machinery, engines, and boilers to be of material of domestic manufacture; that the drawings, plans, and specifications might be changed, the increased or decreased compensation by reason thereof to be determined by a Board on Changes; that materials and workmanship were at all times to be subject to

Naval inspection; that the contractor was to prepare and submit for approval in advance of order for material or commencement of work necessary plans and drawings; that the vessel was to be completed on or before the expiration of eighteen months from the date of contract, with liquidated damages to the United States for delays not excusable under the terms of the contract, e. g., those not within the control of the contractor, the contractor to have an extension of time for completion covering delays attributable to the United States; that the vessel should be subjected to trials, with a guaranteed speed of 29 knots an hour; that although the United States had reason to think that the drawings, plans, and specifications already made would probably result in the production of a speed of not less than 29 knots an hour, it assumed no responsibility with reference thereto, but would give liberal consideration to changes suggested by the contractor; and that the price for the vessel was $283,000, payable in ten equal installments, final payment to be made upon execution of a release to the United States.

On March 14, 1902, the required minimum speed on each vessel was reduced by agreement to 28 knots.

8. Upon execution of the foregoing contracts The Company placed its orders for the necessary material with due promptness. The specifications for the forgings entering into the construction of the three vessels required the use of high-grade nickel steel oil-tempered and annealed instead of carbon steel which had been theretofore used on torpedo boats, and but two plants in the United States, the Midvale Steel Company and the Bethlehem Steel Company, had the facilities to turn out such material as was required for the machined forgings. All the contractors for these torpedo boats and torpedo-boat destroyers placed orders for this material with the same two companies and great delays were experienced in obtaining the forgings. The Company exercised due diligence in efforts to expedite deliveries of all structural material.

On October 27, 1899, The Company first requested an extension of at least twelve months on the three vessels because of delays in obtaining plates, shapes, rivets, steel castings, and nickel steel forgings, due to the large number

of vessels contracted for by the United States Government at the same time, the unprecedented demand for merchant vessels and the fact that only two plants could make the forgings and both were overcrowded with work. Mr. J. F. Hanscom, superintending constructor, wrote that these statements were fair and accurate and that the plaintiff had used all reasonable efforts to obtain the materials. On January 30, 1900, The Company again wrote the Department, referring to the petition of most of the contractors under this Act and stating the specific delays which it had experienced and was still experiencing in obtaining materials and requesting further extension. Mr. Hanscom in his letter of transmittal said that circumstances of so embarrassing a nature have rarely combined to deter completion of a vessel under contract. On March 20, 1900, the Secretary of the Navy advised The Company that due to the difficulty in obtaining timely delivery of steel products, which he considered beyond the control of the shipbuilders, all the contractors would be granted an additional period of twelve months for completion. The Company again wrote the Department on May 16, 1901, regarding these vessels detailing the specific delays which had occurred in obtaining material on each of the vessels and requesting further extension.

On June 11, 1901, the Secretary of the Navy extended the time for completion of the *Bainbridge* to September 1, 1901, of the *Barry* to December 1, 1901, and of the *Chauncey* to October 1, 1901, due in each case, as he stated, to circumstances beyond The Company's control.

The delays covered by these extensions of time covered a period in which there were increases in wages of labor, and in prices of material, and during which sub-contractors failed to deliver material which had been contracted for at the inception of the work and it became necessary for the plaintiff to make new contracts at higher prices for the same material and these contributed to an increase in the cost of construction.

9. The *Bainbridge* was launched October 27, 1901. She had in all thirteen trials by the builders over courses near Newport, Rhode Island, on Delaware Bay and on Chesapeake

Bay. The number of preliminary trials was unusually large and was made necessary by the repeated failures to obtain the contract speed. She had four official trials at which the Government was represented by a trial board. The reduction in the contract speed from 29 to 26 knots was a result of trials with these and torpedo-boat destroyers built by other companies, it having become evident that their displacement was more than forty tons per vessel in excess of that contemplated by the Navy Department as stated in the original proposals. In order to attain the required speed with the added displacement it was necessary to operate the blowers at a greater speed than their designed speed in order to get extra horsepower out of the engines. The strain thus put on the blowers caused repeated failures and they had to be removed and redesigned. The return of the *Bainbridge* to The Company's yard for repairs of the blowers after each of these trials caused further delay and made necessary an unusual number of preliminary trials. The difficulty in obtaining the required speed was due chiefly to the increase in displacement as the plans for the vessels developed without compensating changes in the boilers, the horsepower of the engines or the speed and design of the blowers. The *Bainbridge* was preliminarily accepted as of November 4, 1902, and the time for delivery was extended to that date without penalties for delay. The *Bainbridge* was run at an actual displacement of 41.1 tons in excess of that originally estimated and, as she made the speed required by the contract as modified, was accepted, the Department stating that the greater weight of parts of both hull and machinery gave the vessel greater strength and endurance.

10. The *Chauncey* had her first preliminary trial on November 9, 1901. Changes in the *Chauncey* and the *Barry*, the necessity of which had been shown by experience with the *Bainbridge*, were made during the progress of trials of the *Bainbridge*. The *Chauncey* had four official trials at which the Government was represented by a trial board. Similar difficulty was experienced in making the required speed due to the added displacement as with the *Bainbridge*. The final official trials were held on August 11 and August

13, 1902, and the vessel was preliminarily accepted as of October 22, 1902. At her final trial the *Chauncey* had an actual displacement of 43.2 tons in excess of that originally estimated and as she made the speed required by the contract as modified the penalty for excessive weight was waived, Acting Secretary of the Navy Darling stating that the greater weight of both hull and machinery gave the vessel greater strength and endurance. The time of delivery, having been delayed by circumstances beyond the contractor's control, was extended to October 22, 1902.

The *Barry* had her first preliminary trial on March 28, 1902, changes having been made in the *Barry* similar to those made in the *Bainbridge* and *Chauncey* as result of the experience obtained with the *Bainbridge*. The *Barry* had official trials on August 27, 1902, when she met the requirements of the contract as modified as to speed. The *Barry* was preliminarily accepted as of October 30, 1902. The *Barry* was run at an actual displacement of 52.5 tons in excess of that originally estimated and as she made the required speed penalty for excessive weight was waived for the reasons given in regard to the other vessels.

11. The original plans submitted by the Navy Department were diagrammatic and as the work progressed the detail plans were developed and changes in the plans and specifications were made by the Navy Department from time to time. All detail and working plans were submitted to and approved by the Navy Department before being put into effect. Many details of the construction of these vessels were novel and not within the experience of either the Navy Department or The Company and as the Department obtained experience with them and with the vessels being constructed by other builders under the same Act, substantial changes were made in the design of the vessels, particularly changes in the after section of the hull. The experience obtained by the Department with the *Perry* which was constructed by the Union Iron Works caused the Department to require the stern of these three vessels to be changed. These changes in the stern were ordered made after the vessels built by The Company were practically finished, but while the boats were still on the

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ways. The materials and work entering into the construction of the vessels and all assembly and structural work were currently inspected and approved by representatives of the Navy Department, and the completed vessels were approved before their acceptance.

Most of the changes were not and could not be foreseen, but were found necessary as the work developed. All of them were paid for in accordance with the method provided for in the contracts. In some instances these changes affected not only the particular part changed, but required a change in other parts, increasing the cost of the work, the time involved in preparing revised plans and securing their approval by the Navy Department and securing the new parts and materials and increasing the displacement.

During the course of construction it became apparent that the displacement originally agreed to had been greatly underestimated, and, in fact, it was impractical for The Company, if the vessels were constructed according to the details required by the Navy Department, to keep within the original displacement. With a given horsepower, the increase in displacement materially retarded the speed of the vessels. This, together with the vibration and the additional strain placed on the blowers by the effort to obtain a greater horsepower from the engines, presented a problem which The Company and defendant undertook to solve, and the excessive cost is due largely to the efforts put forth to adjust this situation and the delay incident thereto, as well as to the difficulties in securing timely deliveries of material and the delay resulting therefrom.

12. The costs of direct labor, material, miscellaneous direct charges, and overhead expenses allocated to this work on the basis of direct labor charges as shown below, exclusive of any profit, in the construction of the three torpedo-boat destroyers, were as follows:

Material	$563, 097.63
Direct Labor	342, 302. 95
Distributive Overhead: 16.12% on $342,362.95	55, 179. 24
Direct Overhead Charges	6, 705. 98
Depreciation Charges: 1.986% on $342,302.95	6, 798. 14
Total Cost	$974, 083. 94

The amount paid The Company after allowing for increases and decreases and deductions for uncompleted work due to changes ordered by the Department was $870,262.38.

The actual loss of The Company in the construction of the three torpedo-boat destroyers was as follows:

Total cost of construction	$974, 083. 94
Total amount received	870, 262. 38
Loss	$103, 821. 56

The losses sustained by The Company on its government contracts, including those here involved, were in a large part responsible for its failure in December 1904.

13. The contracts provided that The Company should receive its last payment "On the execution of a final release to the party of the second part (the United States), in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract."

Pursuant to this clause of the contracts The Company on June 15, 1903, acknowledged receipt of the balance due on the contract for the *Bainbridge* and executed a release as follows:

> * * * the Neafie & Levy Ship and Engine Building Company * * * does hereby, for itself, its successors and assigns and its legal representatives, remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever in law and in equity, for or by reason of, or on account of, the construction of said vessel under the contract aforesaid.

On June 15, 1903, like releases were executed by The Company as to the *Chauncey* and *Barry*, acknowledging receipt of the balance due.

14. The Navy Department on February 26, 1902, appointed a board to examine the claims of the several contractors building torpedo boats and torpedo-boat destroyers as to excessive cost of construction, the president of which was Rear Admiral F. M. Ramsay. This board, known as the Ramsay Board, made its report to the Secretary of the Navy April 9, 1902, and it appears at length in Senate

Document No. 112, 58th Congress, 2nd Session, "Relief of Bath Iron Works and Others." It reported that the proper average cost of each of the torpedo-boat destroyers, including labor, material, and indirect costs, but excluding all profit, was $374,200.00.

On March 22, 1902, The Company reported to the Ramsay Board that the actual cost in labor and materials up to March 19, 1902, on these three vessels was:

Total material	$515, 883. 93
Total labor	321, 969. 90

The estimated cost of labor and material and trial trips not yet charged was given as $123,000.00, the shop expense, including deterioration, as $192,170.76. The Company's report and estimate appears on p. 105 of Senate Document 112.

15. For two years or more prior to the above-noted appointment of receivers in 1904, The Company had been in financial straits and certain of its directors and officers, for the purpose of deceiving the stockholders, had made false reports of its financial condition and, in support of such reports, changed and falsified certain of its books of account and records, and caused to be declared dividends when a material deficit instead of a falsely represented surplus existed.

Among the records so changed were the material and labor cost records and general ledger accounts covering the construction of the destroyers *Bainbridge*, *Barry*, and *Chauncey*. A number of the changes in the cost record were ostensibly for the purpose of correcting errors, such changes being made in red or blue ink or by obvious deletion and substitution by interlineation of figures, but by far the greater number of changes, several hundred in fact, ranging from $10.00 to $1,000 were covert, being made in ink of the same color as the original entries without erasure, deletion, or notation to indicate alteration, for example, typically, changing a labor entry from 54 to 154 hours and a charge from $12.89 to $112.89.

The books and records of The Company including the above cost records as changed were turned over to the receiver who employed accountants to examine them and re-

port to him the status of the general and individual ledger accounts of The Company. These accountants in their reports showed that at the time certain dividends were declared there existed deficits in the capital assets of The Company by reason of failure to charge off abandonment of and depreciation on plant equipment, false addition to capital charges, charges for work-in-progress without offsetting credits for payments received on account of such work, and other items of similar character; their reports and conclusions presented in a suit in the Pennsylvania courts resulted in a judgment in favor of the receiver against certain of the directors and officers of The Company. These accountants examined the general ledgers and books of account of The Company but did not make an audit of the detailed construction cost and shop records of labor or material. They did not discover the covert falsification in the construction cost accounts of the three destroyers and reported the costs of the destroyers to be $1,225,714.98, with a resultant loss to The Company of $355,452.60, for which amount the receiver brought this suit. When during the proceedings here certain discrepancies revealed the fact that changes which did not appear on the face of the books had been made, the receiver, through his counsel, agreed to the suggestion of defendant's counsel that all of the available books and records of The Company be turned over to Mr. Joseph A. Honsick, of the United States Maritime Commission, an able accountant and, in all respects, expert in ship-construction-cost accounting and accounting analysis, for a complete audit and determination of the cost of the destroyers. Mr. Honsick, after a long and searching analysis of The Company's records, succeeded in eliminating falsifications and in determining the actual costs of the destroyers, as shown by the original and current entries in The Company's books, to be $974,083.94, the figure set out in Finding 12. The Receiver of The Company was not a party to or, at the time the books were introduced in evidence, aware of the above-noted falsifications; he acted in good faith in presenting the books as turned over to him in support of the claim shown thereby, and upon the appearance of erroneous entries cooperated with and aided the auditor

in ascertaining the actual cost of the vessels and in eliminating incorrect and improper figures bearing thereon from The Company's accounts.

16. The cost of construction of the three vessels was in excess of that which was anticipated by either of the contracting parties. Due to the fact that the construction of torpedo-boat destroyers was not within the experience of either party they did not in fact know their probable cost.

There is no evidence that The Company unnecessarily increased the cost. The vessels when completed departed to a considerable extent from the original calculations and designs of the Navy Department, and very materially so with respect to displacement, but were completed in accordance with all changes therefrom required by defendant's officers under the contract. The Navy Department's calculations and designs resulted in a greater displacement than the designed horsepower of the engine and its appurtenances required to be installed was capable of handling at the agreed speed. The vibration of the engine added to the expense of construction, but there is no proof of inefficiency otherwise in its operation.

WILLIAMS, *Judge*, delivered the opinion of the court:

This case comes before the court upon a reference by Senate Resolution 269, of June 21, 1910, 61st Congress, 2d Session, referring plaintiff's claim, with numerous others, under Senate Bill 8533. The Senate bill proposed to appropriate $371,066.37, as the difference between the actual cost of constructing the vessels involved and the amount paid plaintiff under the contract.

The petition alleges that the actual cost for the construction of the vessels was $1,225,714.98, which involved an actual loss to the plaintiff of $355,452.60, for which amount the court is asked to make a favorable finding. We have found as a fact (Finding 12) that the actual cost of the construction of the vessels was $974,083.94, and that the amount received was $870,262.38, or a loss of $103,821.56. This loss is determined on the basis of the report of the commissioner of the court to whom the case was referred and to whose report neither the plaintiff nor the defendant filed exceptions.

While the builders of the *Bainbridge*, *Barry*, and *Chauncey* sustained a loss of $103,821.56, plaintiff's claim for reimbursement in that amount is neither a legal nor equitable one in a juridical sense. This loss was not caused from any breach of contract, none being alleged in the petition filed herein, and none being established by the facts. Any compensation to which plaintiff may be entitled rests entirely in the discretion of Congress. It is therefore ordered that the facts as decided and determined by the court be reported to the Senate of the United States for whatever action Congress in its wisdom may deem just and proper. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITTAKER, *Judge*, took no part in the decision of this case.

THOMAS EARLE & SONS, INC., A CORPORATION v. THE UNITED STATES

[No. 43042. Decided Janauary 8, 1940; plaintiff's motion for new trial overruled April 1, 1940]

Government contract; meaning of "at its own risk."—Where contractor, whose bid had been accepted, sought permission to begin work prior to the approval of the contract and prior to the receipt of the notice to proceed, and permission to begin work in these circumstances was given "at its own risk," it is held there can be no recovery for additional expense incurred by reason of suspension of the work on a "Stop Order" on all new work, before the approval of the contract.

Same.—The words "at its own risk" are to be construed in their usual and ordinary meaning, which would be that if plaintiff sustained any damage by reason of commencing work before any contract was made, it alone was responsible for such damage.

The Reporter's statement of the case:

Mr. Josephus C. Trimble for the plaintiff.

Mr. Herbert A. Bergson, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact, as follows, upon the stipulation of the parties:

On December 30, 1932, the War Department issued a circular inviting bids for the construction of a steel bulkhead wharf. The specifications accompanying the bid provided that the contractor would be required to commence work under the contract within thirty calendar days after the receipt by him of notice to proceed.

March 28, 1933, the bid which plaintiff submitted was accepted and the contract and bond were sent to plaintiff for signature.

Thereafter, on April 8, 1933, the plaintiff inquired of defendant if there would be any objection to it starting work on the contract prior to the approval thereof and prior to the receipt of the notice to proceed. The defendant advised the plaintiff that there would probably be no objection to such procedure on the understanding that the plaintiff would proceed at its own risk.

Immediately thereafter plaintiff started work at the site and continued until April 24, 1933, when the defendant instructed the plaintiff to suspend operations because of a Stop Order on all new work. On May 22, 1933, the Chief of Engineers approved the contract, and on May 26, 1933, the plaintiff was notified to proceed.

As a result of plaintiff's beginning work about April 8, 1933, and of the Stop Order of April 24, 1933, plaintiff incurred additional expense amounting to $1,146.15 which would not have been incurred if plaintiff had not commenced the work prior to receiving the notice to proceed.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff made a bid on a contract to perform certain work for the defendant. Its bid was accepted and under the specifications, after the contract had been duly approved, it was to commence work on receiving notice to proceed. Thereafter, the plaintiff inquired of defendant if there would be any objection to commencing the work prior to the approval of the contract and prior to the receipt of the

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notice to proceed. The defendant advised the plaintiff that there would probably be no objection to such procedure on the understanding that the plaintiff would proceed at its own risk.

Thereupon the plaintiff began work on the contract and continued until the defendant instructed it to suspend because of a Stop Order on all new work. Afterwards the contract was approved and the plaintiff was notified to proceed. As a result of the plaintiff being stopped on the work which it had begun prior to the approval of the contract, the plaintiff incurred additional expense amounting to $1,146.15 which would not otherwise have been sustained. This action is begun by plaintiff to recover the amount of these expenses.

The controversy in the case is over the effect of the defendant informing plaintiff that it could proceed with the work prior to the execution of the contract at "its own risk."

We think these words should be construed in their usual and ordinary meaning which would be that if the plaintiff sustained any damage by reason of commencing work before any contract was made, it alone was to be responsible therefor.

Plaintiff's petition must be dismissed and it is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

IRVING TRUST COMPANY, A CORPORATION v. THE UNITED STATES

[No. 43100. Decided January 8, 1940; plaintiff's motion for new trial overruled, April 1, 1940]

On the Proofs

Income tax; valuation of assets in merger.—Where New York trust company took over all the assets and liabilities of a New York bank, and issued its stock in payment therefor, after which the stockholders in the former bank owned not to exceed 37.8 percent of the outstanding stock of the trust company, which

Reporter's Statement of the Case

continued without change its corporate existence, changing only its name, it is held that no new corporation was formed, and the provisions of section 113 (a) (7) of the Revenue Act of 1928, that in determining loss or gain in case of a reorganization the basis shall be the same as it would be in the hands of the transferor if an interest of 80 percent or more remained in the same persons, were inapplicable.

Same; cost of property acquired.—Where a corporation acquires property by the issuance of its own stock therefor, and the persons to whom its stock is issued are not in control of the corporation after receiving the stock, the cost to the corporation of acquiring said property is the value of its stock issued therefor.

Same; "write up" of assets binding.—Where bank stockholders receiving trust company's stock for the bank's assets owned, after the transaction, not to exceed 37.8 percent of the trust company's stock, and where the valuation of real estate so acquired by the trust company was written up on its books from $1,800,000 to $2,600,000, and certain securities so acquired were written up by about $400,000, it is held that the parties are bound by these figures, for income tax purposes, in computing gains on subsequent sales of said real estate and securities.

Same; consolidation.—The term "consolidation" is frequently used to denote a fusion of two or more corporations into a newly created corporation, as well as an absorption of one or more corporations by a preexisting one.

The Reporter's statement of the case:

Messrs. Wilton H. Wallace and *Edward F. Colladay* for the plaintiff. *Colladay, McGarraghy, Colladay & Wallace* and *Mr. Martin Saxe* were on the brief.

Mr. D. F. Hickey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact, as follows:

1. The plaintiff, Irving Trust Company, is the successor of American Exchange Irving Trust Company, having succeeded to all its assets and liabilities on February 1, 1929. The American Exchange Irving Trust Company on December 11, 1926, had succeeded to all the assets and liabilities of the Irving Bank and Trust Company and of The American Exchange-Pacific Bank. The Irving Trust Com-

pany maintains its office and place of business at No. One Wall Street, New York, New York.

2. Plaintiff's predecessor timely filed its Federal income-tax return for the calendar year 1928 with the Collector of Internal Revenue for the Second District of New York, showing an income-tax liability of $773,536.45. Said sum was paid by plaintiff's predecessor in installments as follows:

March 15, 1929	$193, 384. 12
June 15, 1929	193, 384. 11
September 14, 1939	193, 384. 11
December 16, 1929	193, 384. 11
Total	773, 536. 45

Said sum of $773,536.45 was covered into the Treasury of the United States by the collector in the usual course of his official business. Of said sum so covered into the Treasury there was refunded to plaintiff on March 9, 1931, the sum of $6,225.90.

3. In its income-tax return so filed, plaintiff reported a taxable profit of $1,128,900 shown to have been realized from the sale of certain realty located at 128 Broadway, New York City, hereinafter referred to as "128 Broadway." In the computation of said profit, plaintiff used as a basis for determining the gain from said sale, the sum of $2,600,000, less depreciation of $17,000 sustained for 1927, or a net figure of $2,583,000.

4. In said income-tax return so filed, plaintiff reported a taxable profit of $58,079.56 shown to have been realized from the sale of certain securities, hereinafter referred to in finding 5. In the computation of said profit, plaintiff used as a basis for determining the gain or loss from the sale, the sum of $2,647,095.

5. Said realty and said securities had been acquired on December 11, 1926, by the Irving Bank and Trust Company, whose name was later changed to American Exchange Irving Trust Company, and still later changed to Irving Trust Company, by merger from The American Ex-

change-Pacific Bank, a corporation organized and existing under the laws of the State of New York.

On November 9, 1926, plaintiff's above-named predecessor had entered into an "Agreement for Merger" with The American Exchange-Pacific Bank. Said agreement is filed as plaintiff's exhibit No. 3 and is by reference made a part of this finding. The preamble recites that the parties desired to merge the Bank into the Trust Company pursuant to the provisions of sections 487 to 496, inclusive, of the Banking Law of the State of New York, and Article I and sections 1 and 3 of Article II provide:

ARTICLE I

Section 1: The Bank shall be merged into the Trust Company and its corporate existence shall be merged into that of the Trust Company and all and singular the rights, privileges, and franchises of the Bank, and all its right, title, and interest in, and to all property of whatsoever kind, whether real, personal, or mixed, and things in action, and every right, privilege, interest, or asset of conceivable value or benefit then existing which would inure to it under an unmerged existence, shall be deemed fully and finally, and without any right of reversion, transferred to and vested in the Trust Company, without further act or deed, immediately upon this agreement going into effect, and the Trust Company shall have and hold the same in its own right as fully as the same were possessed and held by the Bank.

ARTICLE II

Section 1: The name of the Trust Company upon and after the merger shall be "American Exchange Irving Trust Company," hereinafter referred to as "the Continuing Corporation," and its principal place of business shall be in the Borough of Manhattan, City, County, and State of New York.

Section 3: The Trust Company and the Bank shall each contribute to the Continuing Corporation all its assets of every kind and nature whatsoever, real and personal, tangible and intangible, existing at the time the merger becomes effective.

It was further provided that the transfer should become effective, after approval by the stockholders of the two parties, upon the filing in the office of the Superintendent of Banks and in the office of the Clerk of New York County of duplicates of the merger agreement and copies of the proceedings at the respective stockholders' meetings. The agreement was approved by the stockholders on November 26, 1926, and the necessary documents were filed in the proper offices on December 11, 1926. Also on December 11, 1926, the name of the Irving Bank and Trust Company was changed to the American Exchange Irving Trust Company.

6. Pursuant to said agreement, the assets of The American Exchange-Pacific Bank were transferred to the American Exchange Irving Trust Company on December 11, 1926, and said Trust Company became vested with all the right, title, and interest in all the property of The American Exchange-Pacific Bank. Among the assets so acquired were 128 Broadway and the securities referred to in findings 3 and 4, supra. Simultaneously the American Exchange Irving Trust Company distributed 100,000 shares of its stock to the stockholders of The American Exchange-Pacific Bank, and said Bank was dissolved. Following said distribution of stock the stockholders of The American Exchange-Pacific Bank owned not to exceed 37.8 percent of the outstanding capital stock of the American Exchange Irving Trust Company.

7. On November 30, 1926, following the approval of the agreement for merger by the stockholders of the two corporations, the Irving Bank and Trust Company sent its employees to The American Exchange-Pacific Bank, who prepared from its books and records a statement of its condition and installed therein the accounting methods in use by the Irving Bank and Trust Company.

In preparing a statement of the condition of The American Exchange-Pacific Bank effort was made to adjust the securities to market values, some being raised in value, some being lowered, and others having been left unchanged. On December 11, 1926, these securities were taken over on the books of the American Exchange Irving Trust Company at

such adjusted values. Said adjustments resulted in a net book write-up of approximately $400,000 in the value of these securities over the total figure at which they were carried on the books of The American Exchange-Pacific Bank.

The item "bank buildings" appearing on the books of The American Exchange-Pacific Bank were written up from $1,860,000 to $2,670,000. These bank buildings consisted of a building at 470 Broadway, which was carried on the books of The American Exchange-Pacific Bank at $60,000, and 128 Broadway, which was carried on its books at $1,800,000. The property at 470 Broadway was written up to $70,000, and the property at 128 Broadway was written up to $2,600,000.

The values of both the securities and the real estate were written up by the auditor pursuant to instructions received from the officers of the Bank.

8. In 1928 certain of the securities received from The American Exchange-Pacific Bank were sold. The profit realized was computed by deducting from the sale price the values at which the securities were carried on the books, as so adjusted. The sale price thereof was $2,705,174.56, and the adjusted book value was $2,647,095.00. Later, the market value of the securities was checked and it was found that the book value was less than the market value, the market value being $2,652,662.92. Had market values been used in computing the profit realized, the profit would have been $52,511.64, instead of the profit reported of $58,079.56.

9. On June 14, 1928, said bank building at 128 Broadway was sold for $3,750,000. In computing the profit plaintiff's predecessor deducted from the sale price, less depreciation, the book value of this real estate, as so adjusted. This resulted in a profit of $1,128,900. Expert testimony introduced on the trial of this case shows that this real estate at the time of the merger had a market value of $3,550,000. If this market value had been used in computing the profit realized on the sale of this real estate, the profit would have been $221,100.

10. At the time of the merger all the assets of The American Exchange-Pacific Bank were carried on its books at a

total value of $193,750,058.05. The total market value of all the assets, according to the testimony, was at that time $196,617,002.18.

11. On September 14, 1931, plaintiff filed with the Collector of Internal Revenue for the Second District of New York its claim for refund of income tax overpaid for the calendar year 1928 in the principal sum of $138,668.15, plus interest. The grounds set forth in said claim are, first, that in computing the taxable profit on the sale in 1928 of the real estate known as "128 Broadway," New York City, plaintiff was entitled to use, as a base, the cost to it of said property, which it claimed was $3,750,000, as of the date of its acquisition on December 11, 1926, whereas, $2,600,000 had been used as a base; and, second, that in computing the taxable profit on certain securities sold during that year, it was entitled to use as a base the cost thereof to it as of December 11, 1926, which cost it claimed was $2,652,662.92, whereas, $2,647,095.00 had been used as a base.

12. On February 4, 1935, the Commissioner of Internal Revenue by letter rejected plaintiff's claim for refund in its entirety, on the ground that the bases for computing taxable profits upon the sales of said assets should be the cost thereof to the transferor and not the cost to the transferee. On February 23, 1935, plaintiff was notified by registered mail of the rejection of said claim in full.

13. Plaintiff is the sole owner of the claim herein under consideration, and has neither assigned, sold, or transferred said claim or any part thereof to any other person or persons, and no other action has been had on this claim in Congress or before any other Executive department.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

On November 9, 1926, the Irving Bank and Trust Company and The American Exchange-Pacific Bank, both New York corporations, entered into an "Agreement for Merger" of the two corporations, under the terms of which the Bank

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was to be merged into the Trust Company. This agreement provided that, after it had been approved by the Superintendent of Banks and by the stockholders of the respective parties, it should become effective upon the filing in the offices of the Superintendent of Banks and of the Clerk of New York County of sworn copies of the proceedings at the respective corporation meetings. These copies were filed on December 11, 1926, and the merger became effective on that date. Thereafter the business was operated under the name of American Exchange Irving Trust Company. The Irving Trust Company, the plaintiff herein, is the successor of the American Exchange Irving Trust Company.

Among the assets acquired by the American Exchange Irving Trust Company (hereinafter referred to as the Trust Company) was a piece of real estate known as "128 Broadway" and certain securities.

The question presented is the proper bases to be used for the real estate and securities in computing the gain derived from a sale of them in 1928.

The plaintiff insists that it is entitled to use as these bases the cost to it of these assets at the time of the merger. The defendant, on the other hand, insists that the bases to be used are the same as if the assets had remained in the hands of the transferor, The American Exchange-Pacific Bank.

The plaintiff insists that the transaction between the Bank and the Trust Company was a merger; the defendant says it was a consolidation. The plaintiff says this is material because the stockholders of the Bank, which it says was the only transferor, received no more than 37.8 per cent of the stock of the Trust Company. It, therefore, argues that section 113 (a) (7) of the Revenue Act of 1928 (49 Stat. 791, 819) does not apply, because immediately after the transfer there was not an interest or control in the property of 80 percent in the hands of the same persons as it was before the transfer. In other words, the plaintiff says that where a transaction amounts to a merger, as distinguished from a consolidation, there is but one transferor; and that the statute does

not apply unless this transferor receives as much as 80 percent of the stock of the corporation into which it is merged. It concedes that the situation would probably be different in the case of a consolidation, because in the case of a consolidation there is more than one transferor, and so in determining whether or not an 80 percent interest or control is in the hands of the same persons, it is necessary to look to the interest or control of all the transferors.

The term "consolidation" is frequently used to denote both a fusion of two or more corporations into a newly created corporation, as well as an absorption of one or more corporations by a preexisting one. Thus *Noyes* in his book on "*Intercorporate Relations*" defines a consolidation as follows:

> Two corporations may be combined by their fusion into a third corporation created in their stead. This results in the surrender of the vitality of the old corporations, the extinguishment of their special privileges and exemptions, and the springing into existence *eo instanti* of a new corporation, with such powers and privileges as may be conferred upon it by the act authorizing the consolidation. The dissolution of all the old corporations and the creation of the new one are the essential features of this process * * *.

and also as:

> There may be an absorption of one company by another whereby the former is dissolved and passes out of existence while the latter continues to exist with enlarged powers. The word "consolidation" has been said to be inapplicable to a union of this character, but such use of the term is general, and is supported by the highest authorities. (Article 8.)

Later, in Article 11 he defines a merger as follows:

> The word "merger" is used in statutes authorizing the union of corporations to describe the process whereby the property and franchises of one or more corporations are absorbed by another which continues in existence with its original powers and with additional rights and privileges derived from the others. This is a process of absorption to which, as has been noted, the term "con-

> solidation" is generally applied, but to which the term "merger" is equally appropriate. *In fact, had the word "consolidation" been used only to describe the process of fusion and the word "merger" been applied to the process of absorption, confusion would have been avoided.* [Italics ours.]

This distinction has been recognized by the Supreme Court in *Yazoo and Mississippi Valley Railway Company* v. *Adams*, 180 U. S., 1:

> While as stated in *Tomlinson* v. *Branch*, 15 Wall. 460, the presumption is that when two railroads are consolidated each of the united lines will be respectively held with the privileges and burdens originally attaching thereto, subsequent cases have settled the law that where two companies agree together to consolidate their stock, issue new certificates, take a new name, elect a new board of directors, and the constituent companies are to cease their functions, a new corporation is thereby formed subject to existing laws. But if, as was the case in *Tomlinson* v. *Branch*, one road loses its identity and is merged in another, the latter preserving its identity, and issuing new stock in favor of the stockholders of the former, it is not the creation of a new corporation but an enlargement of the old one (p. 19).

The proceedings followed by the Bank and the Trust Company in this case were the proceedings set out by the New York banking law in sections 487–496 of the banking law of the State of New York, providing for the merger of banking corporations. In construing these statutes the Court of Appeals of New York in *Cantor* v. *Manufacturers Trust Company*, 261 N. Y., 6, 184 N. E. 474, said:

> The statute does not contemplate the formation of a new banking corporation through the consolidation of two existing corporations. The result of the merger is that all the rights, privileges, and franchises, and all the property of a corporation which is merged into another, are "transferred to and vested in the corporation into which it shall have been merged." Its corporate identity is lost; it ceases to be a corporate entity, while the corporation into which it is merged continues in existence and succeeds to all its "relations, obligations, trusts, and liabilities."

Whether in this case we shall describe what was done between the Bank and Trust Company as a merger or a consolidation is perhaps not so important, but it is important to bear in mind what was said in *Cantor* v. *Manufacturers Trust Company*, *supra*, and in *Yazoo and Mississippi Valley Ry. Co.*, v. *Adams supra*, that a new corporation was not created, but the old one, to-wit, the Trust Company, was merely enlarged. The Bank went out of existence; the Trust Company continued in existence.

This is important, because in providing for the basis to be used in determining gain or loss in the case of a reorganization, which is defined to mean both a merger and a consolidation [section 112 (i) (1)], the Revenue Act of 1928 says:

> If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control *in such property* of 80 per centum or more *remained in the same persons or any of them*, then the basis shall be the same as it would be in the hands of the *transferor* * * *. (Sec. 113 (a) (7).) [Italics ours.]

If what was done in this case was a merger and not a consolidation, then there was but one transferor, to-wit, the Bank. The Trust Company transferred nothing; it merely continued to exist, retaining in its hands the property which it had before the merger. The only property transferred was the property of the bank.

So, applying sub-section (7) of section 113 (a) to this case, the "property acquired" was the property of the Bank; and "the interest or control in such property" of course refers to "the interest or control" in the property acquired or transferred; and when the act speaks of interest or control of such property remaining "in the same persons" it refers to the persons who formerly had an interest or control in it, to-wit, the Bank. It seems to us that in the case of a merger, before sub-section (7) of section 113 (a) becomes applicable, that company which is merged into the

other must acquire 80 per cent or more of the stock of the continuing corporation.[1]

A different situation arises where there is a consolidation of corporations. As was said in *Yazoo and Mississippi Valley Ry. Co.* v. *Adams*, *supra:*

> * * * where two companies agree together to consolidate their stock, issue new certificates, take a new name, elect a new board of directors, and the constituent companies are to cease their functions, *a new corporation is thereby formed subject to existing laws.* [Italics ours.]

If a new corporation is formed, it, of necessity, follows that the old corporations must transfer to the new one their property, or some of it, and in applying sub-section (7) of 113 (a) to such a transaction we would probably take into consideration the aggregate property acquired from all the corporations, and all the persons who had had an interest or control in any of it to determine whether or not an interest or control of 80 per centum or more remained in the same persons. At any rate, this is the application made of the statute to a consolidation, as distinguished from a merger, by the Seventh and Third Circuit Courts of Appeal in *Fairbanks Court Wholesale Grocery Co.* v. *Commissioner*, 84 F. (2d) 18, and in *MacLaughlin* v. *Harr*, 99 F. (2d) 638, 641.

We have no doubt under the facts in this case that the Trust Company continued its existence and that no new corporation was formed. It is true that the name of the Trust Company was changed from the Irving Bank and Trust Company to the American Exchange Irving Trust Company, but this amounted to no more than the change

[1] That this may result is recognized in *Cantor* v. *Manufacturers Trust Co.*, *supra*. There the court said:

"The Legislature quite probably assumed that ordinarily the merger agreement would provide that the largest and strongest corporation would by the merger absorb a weaker corporation or corporations; and that its stockholders would still dominate after the merger; but the Legislature has provided no standard by which determination of which corporation should receive the other or others into itself shall be made. That is left to the free choice of the corporations which are parties to the agreement."

of the name of an individual. Notwithstanding the change of name, the same individual continues to exist, and in this case the same corporation continued to exist. No new charter was issued, and there was no transfer of the assets of the Irving Bank and Trust Company to the American Exchange Irving Trust Company.

The statutes of New York providing for a merger expressly provide for a change in the name of the continuing corporation, but they equally as definitely provide for the continuation of the old corporation, notwithstanding the change of name. Section 487 provides:

> Any two or more corporations * * * are hereby authorized to merge one or more of such corporations into another of them as prescribed in succeeding sections of this article;

and section 488, in the second paragraph, provides:

> Such agreement shall specify each corporation to be merged and the corporation which is to receive into itself the merging corporation or corporations, * * *. Such agreement may provide the name to be borne by the receiving corporation and such name may be the name of any corporation which is a party to such agreement.

If, therefore, we look only to the letter of the statute in determining the applicability of subsection (7) of section 113 (a) to this transaction, we must look alone to the Bank and its property to determine whether or not an 80 per centum control in the property transferred remained in the same persons in which it had formerly been vested.

This is the view of the Treasury Department at the present time. So far as material here, the Revenue Act of 1938 does not differ from the Revenue Act of 1928, and Article 113 (a) (7)-1 of Regulations 101 issued pursuant to that Act in the fourth paragraph provides:

> Example (2): In 1925 the M Corporation exchanged 10 percent of its voting stock for all the property of the N Corporation which had a basis of $10,000 in the hands of the N Corporation. The basis of the property in the hands of the M Corporation is cost thereof to it at the time of the transfer, that is, the fair market value of the M stock exchanged for the property.

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Moreover, this construction seems to us in harmony with the purpose of Congress. That purpose was to make the basis the same as it was before the transfer where there was no actual change of ownership, but a change only in the form of ownership. Here there was an actual change in ownership. The Trust Company, which before the transfer owned no interest in the property, owned more than 60 percent interest in it after the transfer.

So, in the case of a merger, at any rate, we think the corporation which is merged into another, or its stockholders, must acquire an 80 percent, or greater, interest in the continuing corporation before section 113 (a) (7) is applicable.

The findings of fact show that the stock ownership of the former stockholders of The American Exchange-Pacific Bank in the Trust Company did not exceed 37.8 percent of the total stock outstanding after the merger. We, therefore, conclude section 113 (a) (7) is inapplicable to the case at bar.

Where a corporation acquires property by the issuance of its own stock therefor, and the persons to whom its stock is issued are not in control of the corporation after receiving the stock, the cost to the corporation acquiring the property is, of course, the value of its stock issued therefor.

The value of the stock of the American Exchange Irving Trust Company on December 11, 1926, was $310.00 per share. The total number of shares issued was 100,000, making a total amount paid in stock of $31,000,000. In addition, each stockholder of the bank was paid $40.00 for each share of stock bought, or a total of $3,000,000, and the Trust Company assumed liabilities of the bank amounting to $169,-290,944.25, making a total amount paid for all the assets of the bank $203,290,944.25.

In order to compute the amount paid for the real estate and securities sold in 1928 the plaintiff has introduced proof of the fair market value thereof and of the total market value of all assets acquired from which it computes that the market value of the real estate is 1.8 percent of the total market value of all the assets acquired. It then says that 1.8 percent of the total amount paid for all the

assets should be considered as the amount paid for the real estate, or $3,659,237. This cost price it deducts from the amount received for the property in 1928, to wit, $3,750,000.

We do not think this is the proper basis of computation. When the Irving Bank and Trust Company and The American Exchange-Pacific Bank were contemplating the merger and the amount which the Trust Company was willing to pay to the stockholders of the Bank for the Bank's assets, the Trust Company necessarily examined all the assets of the Bank, and agreed with the Bank on the amount to be paid for them. There is no positive proof in the record to show the value placed on each asset, but after the stockholders of the Bank and the Trust Company had approved the merger, the officers of the Trust Company sent their employees over to the Bank with instructions to install in the Bank the Trust Company's accounting system, and to write up the Bank's books in accordance with instructions received. Pursuant to these instructions, the value of 128 Broadway was "written up" from $1,800,000, at which figure it had been carried on the books of the Bank, to $2,600,000, and the value of the securities was written up about $400,000. Other assets apparently were allowed to remain at the value carried on the books of the Bank. When the assets of the Bank were incorporated in the Trust Company's books they were carried at these values. It seems to us that the necessary inference to be drawn from this is that the parties agreed, in arriving at the figure to be paid the stockholders of the Bank, that the foregoing were the values of the real estate and the securities in question. Evidently their attention had been directed to the value of their real estate and securities because their values were written up.

It seems to us, therefore, that we must take the figure $2,600,000 as the price which the Trust Company paid for the real estate, and the figure of $24,644,069.08 as the price paid for all the securities, and $2,647,095.00 as the price paid for the securities sold in 1928. We think the parties are bound by these figures, notwithstanding expert testimony as

to their value introduced several years later, and after they had been sold in 1928.

It is true that the price paid for the assets exceeded the valuation placed on them by about $10,000,000. This excess presumably was paid for the good will of the Bank. It could not have been paid for the tangible assets, since we are convinced that the figure at which these assets were carried on the books of the Irving Trust Company was the parties' valuation of the assets used in arriving at the total consideration to be paid.

The plaintiff having computed its profit on the basis of these figures in the return filed, it results that there was no overpayment of tax and that the plaintiff is not entitled to recover. Its petition will accordingly be dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

CHARLES H. RANDALL, HECTOR L. RANDALL, ELI G. RANDALL, AND TRUMAN D. RANDALL, TRADING AS T. D. RANDALL & COMPANY v. THE UNITED STATES

[No. 43403. Decided January 8, 1940; plaintiffs' motion for new trial overruled April 1, 1940]

On the Proofs

Government contract; war conditions at time of execution of contract.—Under a Special Jurisdictional Act conferring jurisdiction upon the Court of Claims "to hear * * * to judgment" and "to adjudicate * * * upon the basis of the losses and/or damages suffered due to car shortage and/or other war conditions" the claim of plaintiffs "growing out of losses and/or damages" suffered under purchase orders for furnishing hay to the United States Army during the World War, it is held that the Jurisdictional Act cannot be construed as authorizing the entry of a judgment for any losses or damages sustained by plaintiffs by reason of any conditions that existed prior to and at the time plaintiffs made their offer and entered into the contracts with the Government.

Same.—It is held to be clear upon the record that any loss or expense which plaintiffs may have incurred in excess of prices at which plaintiffs agreed to sell hay to the Government was due not to any car shortage or any war conditions arising subsequent to the date of plaintiffs' offer but to the failure of plaintiffs to acquire title to the hay necessary to fill the Government's contracts or to secure a binding option therefor at a price equal to or less than the price at which plaintiffs agreed to sell the hay to the Government.

The Reporter's statement of the case:

Mr. M. Walton Hendry for the plaintiffs.

Mr. P. M. Cox, with whom was the *Assistant Attorney General*, for the defendant. *Mr. Henry Fischer* was on the brief.

Plaintiffs seek to recover $35,789.87 as the total of losses alleged to have been suffered under Government contracts of July 6, 1918 for 3,600 tons of hay, which losses are alleged to have been directly due to a shortage of railroad cars and war conditions.

The court made special findings of fact, as follows:

1. Plaintiffs are and were, during the times hereinafter mentioned, members of the partnership of T. D. Randall & Company with principal office and place of business at Chicago, Illinois. During the World War they were engaged as hay and grain jobbers in buying and reselling such commodities.

2. During the World War period, plaintiffs obtained twenty or more contracts from the forage division of the Army for furnishing hay to the various remount depots situated principally in the South. Eli G. Randall, one of the partners, frequently visited the forage division of the Army in Chicago to ascertain whether that division would be in the market for hay and grain. Plaintiffs maintained a field agent on the road buying hay or obtaining options therefor from commission men engaged in the hay and grain business located in the hay-producing localities of Michigan, mostly at or near Capac, Lamb, and Armada, Michigan. Large quantities of hay so obtained by plaintiffs were resold to the forage division of the Army.

3. By letter of July 5, 1918, plaintiffs offered to sell 3,600 tons of hay, of a specified quality, to the defendant at a price of $14 a ton, f. o. b. cars at Michigan stations. Deliveries were to be completed not later than August 15, 1918. The offer was accepted by the defendant on July 6, 1918, and a series of seven written purchase orders were executed by the defendant on that date, numbered, respectively, 1904, 1914, 1915, 1916, 1917, 1918, and 1919. On July 5, 1918, the day plaintiffs offered to sell 3,600 tons of hay to the defendant for $14 a ton, the existing market price therefor was $18 to $20 a ton; and during the life of the original contracts such market price progressively advanced so that on August 15, 1918, it had reached a price of $27 to $28 a ton. The low price offered by plaintiffs in their proposal of July 5, 1918, was the main factor which induced the defendant to accept the same.

4. A few days prior to plaintiffs' offer of July 5, 1918, their field agent obtained a verbal option from C. A. Reeves, a hay broker doing business at Capac, Michigan, to sell to plaintiffs the hay covered by the aforesaid purchase orders, being No. 1 mixed hay, at $12 a ton, same to be loaded on cars at Capac, Michigan, which plaintiffs agreed with Reeves to have spotted there when needed. This verbal option called for the delivery of all the hay as specified in the purchase orders with defendant, f. o. b. the same shipping points as named in the purchase orders for delivery in accordance with the purchase orders.

No time limit was fixed in the option given by Reeves. July 15, 1918, Reeves canceled his verbal contract with plaintiffs. However, at a later date, C. A. Reeves, and Reeves and Drager of Capac, Michigan, made shipments on plaintiffs' contracts with defendant, such shipments commencing July 19, 1918, and the price paid by plaintiffs for the shipments on July 19, 1918, was $14 a ton. At a later date, shipments were made to plaintiffs by C. A. Reeves, or Reeves and Drager, at a price of $12 a ton. On July 15, 1918, the date of cancellation of the option, the quotation of the Chicago Board of Trade for hay was $20 to $21; quotation on July 19, 1918, was $21 to $23; and by August 15,

1918, the quotation had reached $27 to $28. The prices paid by plaintiffs to C. A. Reeves, or Reeves and Drager varied from $12 to $24.50 a ton.

Plaintiffs' bid to defendant was based on their option with Reeves; and as soon as plaintiffs received the defendant's purchase orders on July 5 they closed their option with Reeves.

5. Defendant's orders obligated plaintiffs to procure the needed freight cars. On July 5, 1918, and for a considerable period prior thereto, a freight blockade had existed at Eastern terminals which produced a car shortage. Plaintiffs believed that they would be able to furnish Reeves with cars, as called for, for the loading of the hay because, at that time, all cars were under the control of the United States and plaintiffs were getting preference in the way of cars from the defendant on Government orders for hay; and on preference orders plaintiffs had theretofore been having little difficulty in getting cars as needed for delivery under its contracts or orders with defendant. Plaintiffs were as well aware of the car shortage as were defendant's representatives and defendant made no representations to plaintiffs about furnishing cars.

The car shortage was not more acute between July 6 and August 5, 1918, than it had been prior to that time, or at certain other times during the war. No representative of the defendant assured plaintiffs that defendant would procure the cars when needed, although defendant did give plaintiffs all assistance possible in that connection.

6. As soon as plaintiffs closed the option with Reeves, the latter thereupon called upon plaintiffs for the cars for the purpose of loading the hay. Plaintiffs thereupon tried to obtain cars placed for Reeves through defendant's forage department. Plaintiffs were advised by defendant that due to the blockade on Eastern seaboard ports where the boats were loading and due to the fact that the boats were not coming fast enough to take the freight, there was a large accumulation in the Eastern ports. As a result, plaintiffs were not able to get the cars placed for Reeves in accordance with his option. Since plaintiffs were unable to ob-

tain necessary cars as Reeves called for them in accordance with his contract with plaintiffs, Reeves canceled such contract.

7. Notwithstanding the existing car shortage the Government from July to November 1918, inclusive, spotted and made available for plaintiffs' use 1,344 freight cars for the shipment of hay; of this number only 300 cars were needed to move the 3,600 tons of hay called for under the contracts involved herein. During this period approximately 250 of the 300 cars required were, on plaintiffs' request, spotted by the Government at various Michigan points, situated in the hay-growing areas, for shipment of the hay involved in the instant contracts. Some of these cars were placed at Capac, Michigan, for hay shipments made by C. A. Reeves and other hay jobbers located there.

The record does not disclose for what purpose plaintiffs utilized the 1,044 cars in excess of the 300 needed for the contracts herein involved, nor why more of them were not used for the immediate movement of the 3,600 tons of hay for which they had contracts.

8. Plaintiffs went into the market and obtained the hay covered by their contracts with defendant. In doing so they encountered difficulty in securing hay, partly because of the shortage of cars and the war conditions. Also, the Government was in the market buying hay through contracts and otherwise. Plaintiffs' agent traveled during a period of five months in his endeavor to locate and purchase hay. Where plaintiffs found hay available in bulk, they frequently could not purchase same because no cars were immediately available for shipment, and as a result thereof the price greatly increased and plaintiffs could only buy hay loaded on cars at increased prices. Plaintiffs were unable to complete deliveries until November 29, 1918. The contracts contained no provision for the assessment of liquidated damages for delayed delivery, and none were assessed.

9. The record shows that plaintiffs sustained a loss of $21,-849, representing the price paid for the 3,600 tons of hay delivered to the Government under the three purchase order

contracts mentioned in the jurisdictional act in excess of the price of $14 a ton at which plaintiffs contracted to deliver that quantity of hay to the defendant. The claimed loss of anticipated profit of $2.00 a ton, or $7,200, on hay that plaintiffs did not own at the date of the contracts with the defendant is not allowable in any event. There was no breach of contract by defendant, and such an item is not within the loss or damage contemplated by the Special Act. After Reeves canceled the option given to plaintiffs to purchase 3,600 tons of hay at $12 a ton on the alleged ground that plaintiffs did not place cars demanded by him for immediate loading, plaintiffs incurred expenses of $2,278 for traveling expenses and salary for five months of a field representative engaged in locating and purchasing hay in the general market to fulfill the Government contracts of July 6. Other items of claimed losses on account of alleged improperly rejected hay and overhead are not sufficiently established by the evidence to enable the court accurately to determine the same.

Plaintiffs' loss was not directly due to failure on the part of the Quartermasters' Department or the Railroad Administration to furnish freight cars within a reasonable time and as promptly as could be expected under known existing conditions at and prior to July 5, 1918, when plaintiffs made their offer which resulted in the contracts in suit; but such loss was due to the plaintiffs having, on July 5, made an improvident bargain at a price considerably below the then existing market price for the delivery of hay to which they did not then have title at a time of rapidly rising prices and on the basis of a verbal option at a price and on such terms that plaintiffs, as reasonable business men, knew, or should have known, would require immediate shipment. Plaintiffs knew, or should have known from existing conditions affecting the availability of cars when they made their offer, that on July 5, 1918, three hundred freight cars would in all probability, and in the existing circumstances, not be available to be immediately placed by the Railroad Administration at Reeves' warehouse at Capac, Michigan, upon his demand.

The court decided that the plaintiffs were not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The alleged loss of $35,789.87 which plaintiffs seek to recover is alleged to have resulted from failure of defendant to furnish cars when requested which was due to a car shortage during the time the United States was in control of the railroads and to other war conditions. They allege that the failure of the United States to immediately furnish them with railroad cars when demanded in which to ship the 3,600 tons of hay under their contracts with the Quartermaster General's office at a contract price of $14 a ton resulted in plaintiffs losing their option to purchase this hay from others at $12 a ton, and that it forced them at great expense to purchase the hay in the open market at prices greatly in excess of the contract price of $14 a ton to the Government. The suit was instituted under a Special Act as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the claim of T. D. Randall and Company growing out of losses and/or damages suffered under purchase orders numbered 1904, and 1914 to 1919, both inclusive, for furnishing hay to the Army during the late war, is hereby referred to the United States Court of Claims with jurisdiction to hear the same to judgment and to adjudicate the same upon the basis of the losses and/or damages suffered due to car shortage and/or other war conditions: *Provided*, That suit on such claim may be instituted at any time within four months after the date of enactment of this Act, notwithstanding the lapse of time or any statute of limitation (49 Stat. 2305).

Plaintiffs entered into contracts on July 6, 1918, with the Quartermaster General's office for the delivery of 3,600 tons of hay of a specified quality and for a price of $14 a ton, f. o. b. cars, point of shipment, pursuant to plaintiffs written offer of July 5. In these contracts plaintiffs agreed to complete delivery by August 15, 1918. In none of the contracts did the United States obligate itself to furnish plain-

tiffs with the necessary cars within any specified time. At that time the railroads were under the control of the United States, and the World War was in progress.

In substance, plaintiffs' case, upon which they base their claimed right to recover for the alleged increased costs and expenses of the hay delivered to the Government under their contracts, is as follows:

Prior to the time plaintiffs offered to sell the hay to the defendant they had been advised by one of their field purchasing agents that one C. A. Reeves, a commission merchant dealing in hay at Capac, Michigan, would be able to obtain and furnish a large tonnage of hay and that a verbal option had been obtained from him for 3,600 tons of mixed hay; that the option thus obtained imposed upon plaintiffs the obligation of furnishing freight cars when required by Reeves for the loading and shipping of the hay. Plaintiffs expected to procure from Reeves all the hay necessary to fulfill its contracts of July 6, 1918, with the Government and they expected that the United States would furnish, or assist in furnishing, the necessary railroad cars so that the hay which they expected to obtain from Reeves at $12 a ton could be promptly loaded and shipped, although there was nothing in the contract obligating the Government to furnish the railroad cars at any time and no discussion or understanding was had with plaintiffs with reference to furnishing the necessary cars within any specified time. There was no time limit fixed in the options which plaintiffs obtained from Reeves to purchase the hay in question, but plaintiffs agreed in obtaining the option to furnish Reeves the cars at Capac, Michigan, for the loading of hay when needed by him. On July 15, 1918, nine days after plaintiffs had made contracts with the Government, and before the representatives of the Railroad Administration at Michigan points had been able to place 300 empty cars at Capac, Michigan, requested by plaintiffs in which to make shipments of the hay to be purchased from Reeves, the latter canceled his options to plaintiffs. Plaintiffs, therefore, contend that by reason of the cancellation of their options by Reeves they were compelled to go into the open market to

procure the necessary hay to fulfill the Government's contracts at much higher prices and at greater expense, for which the Government should reimburse them by reason of its failure to furnish the 300 railroad cars before Reeves canceled his option.

Upon the facts disclosed by the record, we are of opinion that plaintiffs are not entitled to recover. Certainly there was no breach of any of the contracts by the defendant, and plaintiffs do not so contend. Plaintiffs whole case is based upon the claim that the loss was directly attributable to and caused by car shortage and war conditions, upon the basis of which the jurisdictional act authorizes an adjudication of the loss sustained and the entry of judgment therefor. But it is clear that the jurisdictional act cannot be construed as authorizing the entry of a judgment for any losses or damages sustained by plaintiffs by reason of any conditions that existed prior to and at the time they made their offer and entered into the contracts with the Government. We cannot attribute to Congress an intention to authorize the court to enter judgment in favor of plaintiffs for losses sustained by reason of the fact that with full knowledge of war conditions and car shortages then existing they made an improvident offer to sell hay to the Government at a price then considerably below the existing market price for hay, and during a period of rapidly-rising prices, without first having obtained title to the hay which they contracted to furnish to the Government at a specified price. The Special Act of Congress does not authorize the entry of judgment in favor of plaintiffs for any loss or damage which they may have sustained by reason of the cancellation by Reeves of an option which plaintiffs had obtained from him to purchase at $12 a ton the hay necessary to fill the Government contracts. This was the real reason and the proximate cause of any loss sustained by plaintiffs. The Government cannot be required to respond in damages to plaintiffs by reason of its inability under existing conditions to immediately furnish through the Railroad Administration the three hundred cars necessary in order to prevent Reeves from canceling his option to plaintiffs. *Horowitz* v. *United States*, 267 U. S. 458, 461. The facts clearly show that the

shortage of railroad cars and the war conditions were no different after plaintiffs made their offer on July 5 and their contracts with the Government on July 6, 1918, than they had been for some time prior thereto, and certainly a period of nine days was not a reasonable time, in the circumstances, to allow the Government to furnish, at Capac, Michigan, 300 empty railroad cars.

The Special Act confers upon this court jurisdiction to adjudicate and enter judgment upon the claim of plaintiffs growing out of losses or damages suffered under three Government contracts for hay on the basis of car shortage or other war conditions. The language of the Act makes it plain that the conditions arising after the making of the contracts with the Government, rather than conditions existing on and before July 5, 1918, are to be made the basis for the determination of plaintiffs' losses. The contracts with the Government, under which plaintiffs agreed to furnish the hay, obligated plaintiffs to procure the freight cars for shipment thereof. On the date the contracts were made, and for a considerable period of time prior thereto, a freight blockade had existed at Eastern terminals which had produced a car shortage. No representative of the Government ever assured plaintiffs that the Government would procure the necessary cars for shipment of the hay, although the Government did give plaintiffs all the assistance possible in that connection. Notwithstanding the existing car shortage, the Government from the 1st of July to November 1918, made available and placed for plaintiffs' use 1,344 freight cars for the shipment of hay under various contracts which plaintiffs had with the Government; of this number only 300 cars were needed to ship the 3,600 tons of hay called for under the three contracts mentioned in the jurisdictional act and involved herein. During the period mentioned about 250 of the 300 cars, required by plaintiffs to ship the hay in question, were placed by the Government on plaintiffs' request at various Michigan points situated in the hay-growing area for shipment of the hay involved in the instant case. Some of these cars were placed at Capac, Michigan, for hay shipments which plaintiffs obtained from Reeves at increased prices, after Reeves had

Syllabus

previously canceled the option which he had earlier given plaintiffs, and for shipments by other hay jobbers located there. Plaintiffs completed their deliveries to defendant under the contract involved on November 29, 1918.

Upon the whole record, we think it is clear that any loss or expense which plaintiffs may have incurred in excess of prices at which they agreed to sell the hay to the Government was due not to any car shortage or any war conditions arising subsequent to July 5, 1918, but to the failure of plaintiffs to acquire title to the hay necessary to fill the Government's contracts or to secure a binding option therefor at a price equal to or less than the price at which they agreed to sell the 3,600 tons of hay to the Government.

Plaintiffs are therefore not entitled to recover and the petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

MIDPOINT REALTY COMPANY, INC. v. THE UNITED STATES

[No. 43130. Decided January 8, 1940; defendant's motion for new trial granted, findings and opinion amended, judgment vacated and withdrawn, and petition dismissed, April 1, 1940]*

On the Proofs

Income tax; affidavit of parent corporation not claim for refund.—Where parent company submitted to the Internal Revenue Bureau an affidavit, on July 29, 1927, stating that said parent company owned at least 95 percent of the voting stock of each of several corporations, including plaintiff, and that plaintiff corporation had not been included in the consolidated return for the years prior to 1925, but that a revised statement would be filed for the years 1922, 1923 and 1924, showing proper adjustment for its inclusion, it is held that such affidavit did not constitute a timely claim for refund for 1924.

Same; account stated.—Where on July 19, 1929, the Commissioner in a letter to the parent corporation stated the amount of overassessment against plaintiff, to which parent corporation and

*See page 345.

Reporter's Statement of the Case

plaintiff agreed in conference on August 8, 1929, although there was disagreement as to other items not affecting plaintiff, it is held that there was an account stated as of the date of said conference, August 8, 1929, as to the 1924 income tax of plaintiff.

Same; lack of unequivocal acceptance.—Where letter of parent corporation, October 11, 1929, stated that agreement enclosed should not become effective until approved by the Secretary, or Under Secretary, of the Treasury, as required by section 606 of the Revenue Act of 1928, it is held that such letter did not operate to prevent the account from becoming an account stated for lack of unequivocal acceptance by both parties.

Same; elements of account stated.—The essential elements of an account stated are an agreement between the parties on the statement of the account and a promise, express or implied, on the part of the debtor to pay the balance.

The Reporter's statement of the case:

Messrs. Ellsworth C. Alvord and *Floyd F. Toomey* for the plaintiff. *Alvord & Alvord* were on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

This is a suit to recover an admitted overpayment of income taxes for the year 1924. The defendant defends on the ground that no claim for refund was filed within the statutory period. The plaintiff insists such a claim was filed and that it was a sufficient claim; and it also insists that, even if no valid claim were filed, that certain transactions between it and the defendant resulted in an account stated, and that a part of the amount for which it sues was paid less than four years prior to the statement of the account, and that for this reason it is entitled to recover this amount, in any event.

A stipulation of facts entered into by the parties was all the evidence introduced. On the basis of this stipulation the Court made the following special findings of fact:

1. The plaintiff is a corporation organized under the laws of the State of New York, with its principal office and place of business in that State. During the calendar year 1924

the plaintiff was affiliated with and was a subsidiary of Salmon Realty Corporation (now known as the Woodside Improvement Company), a Delaware corporation.

2. On June 15, 1925, plaintiff filed a separate income tax return for the calendar year 1924 disclosing a total tax liability of $15,355.55, which was paid as follows:

On March 13, 1925	$4,000.00
On June 15, 1925	3,677.78
On September 14, 1925	3,840.00
On December 10, 1925	3,837.77
Total	15,355.55

On the same date, a consolidated return for the calendar year 1924, disclosing a total tax liability of $86,519.80, was filed by Salmon Realty Corporation for itself and various affiliated corporations, not including the plaintiff. Said amount was paid on or before December 10, 1925.

3. On June 9, 1927, the Commissioner of Internal Revenue requested information relating to the question whether the Salmon Realty Corporation and various of its affiliated corporations, including the plaintiff, were "affiliated" within the meaning of section 240 (c) of the Revenue Act of 1924.

4. Pursuant to that request, on July 29, 1927, the Salmon Realty Corporation, for itself and its affiliated corporations, including the plaintiff, filed with the Bureau of Internal Revenue a statement, sworn to by Albert T. Hunter, Secretary of the Salmon Realty Corporation, in part, as follows:

STATE OF NEW YORK,
County of New York, ss:

Albert T. Hunter, being duly sworn, deposes and says:

That he is Secretary of Salmon Realty Corporation; that he makes this affidavit as requested in and in reply to a letter addressed to the Salmon Realty Corporation, dated June 9, 1927, from the office of the Commissioner of Internal Revenue, Washington, D. C.

I. At least ninety-five per cent (95%) of the voting capital stock of the following corporations was acquired on the dates set opposite their names:

Midpoint Realty Co., Inc.—Prior to January 1, 1924.
Bryant Park Building, Inc.—Prior to June 1, 1925.
Hamilton Leasing Co., Inc.—Prior to June 1, 1925.

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As to Midpoint Realty Co., Inc., through a misunderstanding this return was not included in our consolidated income-tax return prior to the year 1925; but we are now preparing a revised statement to be filed for the years 1922, 1923, and 1924, showing proper adjustment for its inclusion.

* * * * * * *

(Signed) ALBERT T. HUNTER.

Sworn to before me this 29th day of July 1927.

(Signed) R. M. GEIGER.

5. Thereafter, the Commissioner of Internal Revenue determined that the plaintiff was affiliated with Salmon Realty Corporation and its various other subsidiary corporations for the calendar year 1924, and proceeded to determine the tax liability of the group for that year in accordance with section 240 of the Revenue Act of 1924.

6. As a result of the foregoing, on July 19, 1929, the Commissioner of Internal Revenue transmitted a letter to the Salmon Realty Corporation and its affiliated corporations, including the plaintiff, setting forth his determination of the correct income-tax liability of said corporations for the calendar year 1924 on the basis of treating the plaintiff as a member of the affiliated group of which the Salmon Realty Corporation was the parent. There was forwarded with said letter a statement showing that the correct tax liability of the plaintiff for the calendar year 1924 was $6,139.93; that the tax previously assessed was $15,355.55; and that there was an overassessment of $9,215.62. With that letter there was transmitted Form 866, being "Agreement As to Final Determination of Tax Liability."

7. Upon receipt of the above-mentioned letter of July 19, 1929, the officers of the Salmon Realty Corporation and its affiliated corporations, including the plaintiff, examined the same and found that the aggregate overassessment of $28,-908.51 agreed with their own figures, but the aggregate of the "Tax Previously Assessed" and the "Corrected Tax Liability" as found by the Commissioner differed from their figures. On August 8, 1929, a conference was held at the Bureau of Internal Revenue, at which these differences were discussed.

8. The Commissioner of Internal Revenue adopted plaintiff's figures and on September 9, 1929, transmitted a letter to Salmon Realty Corporation and its various affiliated corporations, including the plaintiff, setting forth his determination of the tax liability of the affiliated group for the calendar year 1924. There was forwarded with said letter a revised statement showing that the correct tax liability of the plaintiff for the calendar year 1924 was $6,139.93; that the tax previously assessed was $15,355.55; and that there was an overassessment of $9,215.62. Said statement concluded as follows:

> Certificates of Overassessment for the amounts shown above will be issued through the office of the Collector of Internal Revenue for your district, and will be applied by that official in accordance with the provisions of Section 284 (a) of the Revenue Act of 1926.

Said letter enclosed a new form of "Agreement as to Final Determination of Tax Liability" (Form 866).

9. Salmon Realty Corporation and its various affiliated corporations, including the plaintiff, duly executed and transmitted to the Commissioner of Internal Revenue by letter dated October 11, 1929, said form of "Agreement as to Final Determination of Tax Liability" (Form 866). Said letter read as follows:

> We return herewith duly signed, as requested in your letter of September 9, 1929 (Symbols IT: AR–D, Law), Form 866-CR, being agreement as to a determination of tax liability for this company and its subsidiary and affiliated companies for the years 1923, 1924, and 1925 in an aggregate amount of $271,031.94, with the understanding, however, that this agreement is not to be in any way effective unless and until approved by the Secretary or Under Secretary in accordance with the provisions of Section 606 of the Revenue Act of 1928 and also with the understanding that refund or credit will be made of the overassessments in the aggregate amount of $28,908.51, as set forth in the schedule accompanying the Department's letter IT: AR: D Law, of September 9, 1929.

This particular form was not approved by the Secretary of Treasury by reason of the fact that it was determined by the Commissioner that a different form should be used.

10. Thereafter, by letter dated September 11, 1931, the Commissioner of Internal Revenue advised Salmon Realty Corporation, and its various affiliated corporations, that the refund of certain of the overassessments set forth in said letter of September 9, 1929, including the amount of $9,-215.62 overpaid by the plaintiff, was barred by the statute of limitations.

11. On June 5, 1933, a new Form 866 was mailed to the plaintiff based in part upon the determination of the Commissioner of Internal Revenue set forth in his said letter of September 9, 1929, that there was an overassessment of income taxes paid by the plaintiff for the calendar year 1924 in the amount of $9,215.62. Said form was duly executed by Salmon Realty Corporation and its affiliated corporations, including the plaintiff, Midpoint Realty Company, Inc., and was transmitted by a duly authorized agent of said corporations to the Commissioner of Internal Revenue by letter dated August 1, 1933.

12. On November 22, 1933, the Secretary of the Treasury approved the form of "Agreement as to Final Determination of Tax Liability" (Form 866) transmitted with said letter of August 1, 1933, approval thereof appearing on schedule 7037. Thereafter, the Disbursing Officer of the Treasury prepared a check drawn on the Treasury of the United States in payment of the full amount of $9,215.62 overpaid by the plaintiff Midpoint Realty Company, Inc., for the year 1924, as set forth in the Commissioner's letter of September 9, 1929, together with interest thereon as provided by law.

13. On receipt of said check for approval the Comptroller General disallowed $5,377.85 of the principal amount set forth in said letter of September 9, 1929, as an overpayment by the plaintiff for the year 1924, on the theory that a timely claim for refund had not been filed with respect to that part of said overpayment.

14. On February 9, 1934, the sum of $3,837.77, with interest thereon to January 23, 1934, was refunded to the plaintiff. Likewise, on February 9, 1934, the Commissioner of Internal Revenue mailed to the plaintiff, Midpoint Realty Company, Inc., a Certificate of Overassessment (No. 2286066;

Schedule IT: 51921), setting forth that the overassessment of the plaintiff for the calendar year 1924 was in the amount of $9,215.62, but that of such amount only $3,837.77 was refundable, refund of the remainder being asserted to be barred by limitation. No part of the balance of $5,377.85 has been refunded or credited to the plaintiff.

The court on January 8, 1940, decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

It is not controverted that the plaintiff overpaid its taxes for 1924 in the amount of $9,215.62. Of this amount $3,837.77 has been refunded, but the defendant denies liability for the balance on the ground that a timely claim for the refund thereof was not filed. Payments were made as follows: $4,000 on March 13, 1925; $3,677.78 on June 15, 1925; $3,840 on September 14, 1925, and $3,837.77 on December 10, 1925. To entitle plaintiff to recover, a claim for refund thereof must have been filed within four years from the date of payment, unless plaintiff's alternative position, later discussed, is correct. Section 284 (b) of the Revenue Act of 1926. (44 Stat. 9, 66.)

The plaintiff says a certain affidavit made by the Secretary of the Salmon Realty Corporation, plaintiff's parent corporation, on July 29, 1927, set out in finding 4, was such a claim. If this be true, plaintiff is entitled to recover, because this was well within time; but it seems obvious to us this was not a claim for refund. It merely stated that the Salmon Realty Corporation owned at least ninety-five percent of the voting stock of certain corporations, including the Midpoint Realty Company, that the Midpoint Realty Company had not been included in the consolidated return through a misunderstanding, and that they were preparing a revised statement including it. There was not even a suggestion that this revised statement would show an overpayment of tax, much less a demand for a refund.

There was no written claim for refund filed until the letter from the Salmon Realty Corporation on October 11, 1929. (For letter see finding 9.) This was written more than four years after all the payments were made, save

that on December 10, 1925. This payment made on December 10, 1925, has been refunded, as stated above.

It follows that plaintiff is not entitled to recover the other payments made, unless it is correct in saying that the Commissioner's letter of September 9, 1929, amounts to an account stated, this suit having been filed exactly six years after the date of this letter.

Previously, on July 19, 1929, the Commissioner of Internal Revenue wrote the Salmon Realty Corporation, plaintiff's parent corporation, a letter stating the "corrected tax liability" of all the companies to be $199,391.97, the "tax previously assessed," $228,300.48, and the overassessment, $28,908.51. He stated the "correct tax liability" of the Midpoint Realty Company to be $6,139.93, the "tax previously assessed" to be $15,355.55, and the overassessment to be $9,215.62. Upon examination of the Commissioner's figures, the Salmon Realty Corporation, acting for itself and others, including plaintiff, agreed on the aggregate overassessment, but disagreed with the Commissioner's statement of the "correct tax liability" and the "tax previously assessed" as to certain corporations other than plaintiff. It was thought that each had been understated by the same amount, so that when they should be revised the overassessment would remain the same.

In order to have these errors corrected, representatives of the plaintiff had a conference with the Commissioner's representatives on August 8, 1929, at which time the alleged errors were pointed out. Following that conference the Commissioner wrote the Salmon Realty Corporation on September 9, 1919, adopting plaintiff's figures. The letter of September 9, 1919, made no change in the "correct tax liability," the "tax previously assessed," or the overassessment of the Midpoint Realty Company.

The plaintiff says that on that date there was an account stated between the parties. We agree there was an account stated between them not later than that date. In fact, as to the plaintiff, we think there was an account stated on August 8, 1929, because on that date there was an agreement between them as to the account of the Midpoint Realty Company. *Daube* v. *United States*, 75 Ct. Cls., 633, 289 U. S. 367;

Shipley Construction Company v. *United States*, 79 Ct. Cls., 736. From all the facts it is apparent that the Salmon Realty Corporation did not disagree with the Commissioner's figures as to the plaintiff company, as set out in his letter of July 19, 1929. The Commissioner's figures in his letters of July 19, 1929, and September 9, 1929, were identical as to it. The Commissioner was undoubtedly notified of this agreement at the conference on August 8, 1929.

It is true that after receipt of the Commissioner's letter of September 9, 1929, the Salmon Realty Corporation replied on October 11, 1929, enclosing the "Agreement as to Final Determination of Tax Liability," and that its letter enclosing the agreement stipulated that "this agreement is not to be in any way effective unless and until approved by the Secretary or Under Secretary in accordance with the provisions of the Revenue Act of 1928 * * *." This letter was written more than four years after all payments were made except the one in December; but this was not the first time the taxpayer had assented to the Commissioner's statement as to the Midpoint Realty Company. This, as we have said, was on August 8, 1929. This date was prior to the expiration of four years from the date of the payment of $3,840.00 on September 14, 1925.

Nor can we say that the condition imposed by the letter of the Salmon Realty Corporation in its letter of October 11, 1929, that the agreement enclosed should not become effective until approved by the Secretary or the Under Secretary, prevented the account from becoming an account stated for lack of unequivocal acceptance by both parties. There was no disagreement as to the amount due the plaintiff, nor did the condition imposed express a disagreement as to the amount due. That condition related only to the circumstances under which section 606 of the Revenue Act of 1928 (45 Stat. 791, 874) should become effective. That section made agreements between the taxpayer and the Commissioner, which were approved by the Secretary or the Under Secretary, final and conclusive, and prevented a reopening of the case for any cause by either the taxpayer or by the Government, except for fraud. Such an agreement is something

more than an account stated, which may be reopened for mistake as well as fraud. We do not regard its execution as necessary to the consummation of an account stated. The essential elements thereof are an agreement between the parties on the statement of the account and a promise, express or implied, on the part of the debtor to pay the balance. There was such an agreement on August 8, 1929, and the taxpayer's letter of October 11, 1929, in our opinion, did not withdraw its assent thereto. Certainly it affords no justification for the Commissioner to refuse to fulfill his implied promise to pay the balance due as set out in his letters of July 19, 1929, and September 9, 1929, a duty cast upon him by statute. Section 284 of the Revenue Act of 1926.

(Judgment vacated April 1, 1940. See below.)

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

ON MOTION FOR A NEW TRIAL

WHITAKER, *Judge*, on April 1, 1940, delivered the opinion of the court:

The defendant has filed a motion for a new trial on the ground that the cause of action sued on accrued more than six years prior to the filing of the petition.

The plaintiff's petition was filed on September 9, 1935. In this petition it alleged that an account stated had been arrived at between it and the defendant on September 9, 1929, which was exactly six years prior to the filing of this petition; hence, on the original trial of this case the defendant did not defend on the ground that the action had accrued more than six years prior to the filing of the petition. However, in our opinion of January 8, 1940, we held that there had been an account stated at an earlier date, to wit, on August 8, 1929, and, accordingly, the defendant now files a motion for a new trial on the ground that the action is barred by the statute of limitations. Since under our findings plaintiff's petition was filed more than six years after the accrual of the cause of action on which it sues, it results that the defendant's motion for a new trial must be granted.

Syllabus

The findings and opinion heretofore filed are amended in accordance with the foregoing, the judgment entered herein on January 8, 1940, is vacated and withdrawn, and plaintiff's petition is dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WILLIAMS, *Judge*, took no part in the decision of this motion.

(NOTE.—Plaintiff's motion to extend time to June 6 to file motion for new trial filed and allowed May 31, 1940; plaintiff's motion for new trial filed June 6, 1940.)

JOHN CRAIK v. THE UNITED STATES

[No. M-79. Decided February 5, 1940]

On the Proofs

Income tax; income of nonresident alien from partnership.—Where a nonresident alien was a member of a partnership doing business in the United States and deriving a portion of its income from sources without the United States, it is held that he is entitled to exclude from his gross income for income-tax purposes his distributive share of the partnership income so derived, under section 213 (c) of the Revenue Act of 1918.

Same; partnership income.—Congress intended, in various income-tax acts since 1913, to treat partnership income as if the distributive share of each partner therein had been received directly by the partner.

Same; common-law partnership.—The treatment of partnership income on the same basis as if it had been received by the partner directly is consistent with the common-law idea of partnership, according to which the personal property of the partnership was held not by the partnership but by the partners in common.

Same; intent of Congress as to deductions.—By the specification of certain items for which the partner might take credit Congress did not intend to exclude all others, if such exclusion would result in the treatment of partnership income otherwise than if such income had been received by the partners individually.

Same; power of Congress as to deductions.—It is within the power of Congress to limit deductions from gross income to any extent that Congress may deem wise.

Same; "domestic partnership."—Income from a "domestic partnership" is not income from sources within the United States where a portion of such income is derived from sources without the United States.

Same; partnership not a separate entity.—The Revenue Act does not regard a partnership as a separate entity.

The Reporter's statement of the case:

Mr. Richard S. Holmes for the plaintiff.

Mr. John W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

After much evidence had been taken in this case, the parties entered into a stipulation of facts, submitting the case to the court thereon. Upon the basis of this stipulation, the court made the following special findings of fact:

1. During the calendar years 1917, 1918, and 1919 the plaintiff, John Craik, was a nonresident alien and was a member of a partnership known as Balfour, Guthrie & Company, which had its principal office at No. 351 California Street, San Francisco, California, and which also maintained offices in Portland, Oregon, Seattle, Washington, Vancouver, British Columbia, and in other places on the Pacific Coast within the continental limits of the United States. Part of the business of the partnership was, among numerous other things, the purchase of goods within the United States and the exportation thereof to foreign countries.

2. During said years plaintiff was also a member of a partnership known as Balfour, Williamson & Company, which had its principal office at No. 43 Exchange Place, New York City. The business of this partnership was, among numerous other things, the exportation of goods from the United States.

3. During said years plaintiff's distributive share in the net income of Balfour, Guthrie & Company was 5 percent, and of Balfour, Williamson & Company was 1/47.

4. During said years Balfour, Guthrie & Company derived net income from sources without the United States in the amount of $191,791.06 for 1917, $250,370.47 for 1918, and

$87,367.63 for 1919. Plaintiff's distributive share thereof was $9,589.35 for 1917, $12,518.52 for 1918, and $4,368.38 for 1919.

5. During said years Balfour, Williamson & Company derived net income from sources without the United States in the amount of $54,840.86 for 1917, $16,008.83 for 1918, and $30,723.89 for 1919. Plaintiff's distributive share thereof was $1,337.58 for 1917, $340.61 for 1918, and $657.96 for 1919.

6. Both of the foregoing partnerships duly filed partnership returns of income for the years 1917, 1918, and 1919, and included therein the amount of income derived from sources without the United States, as set forth above; and the plaintiff included in his income tax returns for said years the amount of his distributive share of the total income of said partnerships as shown on their returns.

7. Later, plaintiff duly filed with the Commissioner of Internal Revenue a claim for refund of the tax paid by him by reason of the inclusion within his income of his distributive share of the net income of the partnerships from sources without the United States.

On September 10, 1929, the Commissioner of Internal Revenue rejected said claim, and has since refused to refund the taxes claimed.

8. If plaintiff is not taxable upon his distributive share of the partnership income received from sources without the United States, he is entitled to a refund of the following amounts, plus interest at 6 percent from the dates shown: $2,671.65 with interest from June 15, 1918; $6,508.14 with interest from December 15, 1919; and $2,186.15 with interest from December 15, 1920.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff during the time in question was a nonresident alien. He was a member of two partnerships operating in this country. Both of these partnerships derived a portion of their income from sources without the United States. The plaintiff, being a nonresident alien, claims the right to exclude from his income his distributive share of the

partnership income derived from sources without the United States, under section 213 (c) of the Revenue Act of 1918 (40 Stat. 1057, 1066), which reads in part as follows:

> "In the case of nonresident alien individuals, gross income includes only the gross income from sources within the United States, * * *"

and a similar provision of the Revenue Act of 1916 (39 Stat. 756) [section 1 (a)].

The provisions of the Revenue Act of 1916, as amended, and of the Act of 1918 applicable here are substantially the same. Section 218 (a) of the Revenue Act of 1918 provides:

> That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

It then provides that each partner, in computing his net income, shall include "his distributive share, whether distributed or not, of the net income of the partnership * * *."

In subsection (d) the method of computing the net income of the partnership is prescribed. It is provided that it "shall be computed in the same manner and on the same basis as provided in section 212, except that the deduction provided in paragraph (11) of subdivision (a) of section 214 shall not be allowed." The paragraph referred to is that permitting deductions for charitable and similar contributions.

Since the partnership in computing its net income was required to include, as was an individual, dividends received from corporations and interest on United States obligations, and since an individual in computing his income subject to normal tax was entitled to deduct such items, it was provided that a partner might deduct from his income his proportionate share of such interest and dividends received by the partnership.

An examination of the various income tax Acts, beginning with the first one of 1913, shows that Congress in the enactment of each of them intended to treat partnership income as though the distributive share of each partner therein had been received directly by the partner. Each one of the Acts

contains the statement that "individuals carrying on business in partnership shall be liable for income tax only in their individual capacity," and each one of them allows the partner the same credit against partnership income to which he was entitled against his individual income.

The 1913 Act did not in terms allow the credits allowed by the 1918 Act. This, undoubtedly, was because Congress had the common-law view of a partnership and, therefore, did not think it necessary to enact such an express provision, assuming that it would be understood that the income of the partnership was intended to be treated as that of the individual partners.

In the enactment of the Revenue Act of 1916, however, Congress made express provision for the exclusion from the individual partner's income of that part of his proportionate share of the partnership income which would have been excluded had the income been received by him individually, such as interest on United States obligations, or those of a State or political subdivision thereof, taxes paid to the United States, or to any State or political subdivision, and their proportionate share of dividends received by the partnership; thus more fully expressing its intent that the partnership should not be treated as a separate entity, but that income received by it should be treated as income received by the individual partner.

A different method for the handling of partnership income was provided for in the 1918 Act. By that Act rules were laid down for the computation of the partnership income, whereas none had been in either the 1913 or 1916 Acts. A partnership was required to compute its income as did an individual, but in order to treat the partner's distributive share thereof on the same basis as his individual income, the credit for his proportionate share of dividends and interest on United States obligations was expressly allowed him. This indicates to us again that Congress intended to treat partnership income as income received by the individual partners.

The 1921, 1924, and 1926 Acts contained the same provisions as the 1918 Act.

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Opinion of the Court

The 1928 Act allowed an individual credit for earned income and allowed him to compute capital net gains and losses on a basis different from ordinary gains and losses. So, continuing its policy of treating a partner's distributive share of partnership income on the same basis as income received by him individually, it was provided that a partner should be entitled to credit for his proper part of the partnership's earned income, and that his proper part of the partnership's capital net gains and losses and of its ordinary net income should be taxable to him as though they had been received by him directly. The partner was also permitted to deduct his proportionate share of the net loss of the partnership and his proportionate share of income, war-profits, and excess-profits taxes paid foreign countries.

The 1932 Act was to the same effect.

Only in one respect might it be said that Congress had evinced a purpose not to treat partnership income as income received by the individual partners. That is, that partnerships in computing their income were not entitled to deduct charitable contributions; whereas individuals were. But the Bureau of Internal Revenue held, after this restriction had been placed on partnerships in the 1918 Act, that the respective partners were entitled to the deduction in computing their individual income. O. D. 185, 1 C. B. 151. After this ruling was made Congress enacted the 1921, 1924, 1926, 1928, and 1932 Acts and made no change in the law, thus evidencing its approval of this ruling, and thus further evidencing its intention that a partner's distributive share should be treated as though it had been received by him individually.

In the 1934 and 1936 Acts the prohibition against the deduction of charitable contributions in computing the income of partnerships was eliminated. The 1938 Act prohibited the deduction to the partnership, but permitted the partners to deduct their proportionate share, going back to the practice established when the 1918 Act was passed.

The treatment of partnership income on the same basis as though it had been received by the partner directly is consistent with the common-law idea of a partnership. At common law, the personal property of the partnership was

held not by the partnership, but by the partners in common. Real estate was held by an individual for the benefit of the partnership, because a partnership was not an entity and, therefore, could not hold the title. Each partner was liable for the debts of the partnership on the theory that they were the partners' debts and not the debts of the partnership. Each partner was the agent for the other partners in the carrying out of their common purpose. The income earned by the partnership was regarded as having been earned by each of the individual partners, either by himself individually or through his agents, the other partners.

The Bureau of Internal Revenue has so treated partnership income for twenty years. Originally it promulgated a regulation providing that partnership income could not be traced to its source behind the partnership for the purpose of claiming individual exemption. This ruling, however, was questioned and presented to the District Court for the Northern District of Ohio. On June 26, 1918, the court rendered an opinion holding that the Revenue Acts treat a partnership's—

> * * * profits and its earnings as those of the individual taxpayer. * * * The Congress, consequently, it would seem, ignored, for taxing purposes, a partnership's existence, and placed the individual partner's share in its gains and profits on the same footing as if his income had been received directly by him without the intervention of a partnership name. (251 Fed. 982.)

This case was affirmed on appeal. *United States* v. *Coulby*, 258 Fed. 27.

It is admitted that since this time partnership income has been so treated by the Bureau. In the light of this administrative practice Congress has continued to enact substantially the same provisions for the treatment of partnership income.

The defendant, however, presses upon us the decision of the Second Circuit Court of Appeals in *Johnston* v. *Commissioner of Internal Revenue*, 86 F. (2d) 732, Circuit Judge Swan dissenting. In that case the majority of the court held that a partner was not permitted to offset his noncapital net loss against his proportionate share of the partnership net gain. The Court thought that Congress, by providing for certain specific credits against a partner's income on account

of his share of partnership profits, thereby impliedly prohibited any other credit. The Court called attention to the fact that the Act expressly provided for taxing the partners on their distributive share of capital net gains as if it had been received by them individually, and thought that its failure to mention noncapital gains and losses indicated that it did not intend that they should be treated similarly. This case was followed by this court in *Klingenstein* v. *United States*, 85 C. Cls., 164; 18 F. Supp. 1015.

Congress' attention having been given to gains and losses, and having provided for the treatment of capital gains and losses as if they were the gains and losses of the individual partners, and not having made such provision for noncapital gains and losses, there was room for the conclusion reached in the *Johnston case*, *supra*. But we do not think that by the specification of certain items for which the partner might take credit Congress intended to exclude all others, if the exclusion of them would result in the treatment of partnership income in a way different from what it would have been treated had it been received by the partners individually.

It is, of course, within the power of Congress to limit deductions from gross income to any extent it pleases, but our study of the pertinent sections of the 1916 and 1918 Acts and of related sections of other acts persuades us that Congress intended that an individual should have every deduction from partnership income which he might take from his individual income, unless the contrary clearly appears.

However, we are dealing here not with what credits or deductions a partner is entitled to, but what he shall include in his gross income. We are convinced that Congress intended that partnership income should be treated as though it had been received by the partners individually. If we are correct in this, then this plaintiff's proportionate share of the partnership income received from sources without the United States should be treated as though he himself had received this income directly, and not through the conduit of the partnership. If so, in computing his income, his proportionate share of the income from sources without the United States should be excluded.

Syllabus

The defendant further takes the position in its brief that the plaintiff received his income from the partnership, and since the partnership was a "domestic partnership" his income was from sources within the United States, from whatever source the income might have been derived by the partnership. This cannot be true unless the partnership is regarded as a separate entity, and this the Revenue Act does not do. (Cf. *Dorothy S. Bence* v. *United States*, 84 C. Cls., 605; 18 F. Supp. 848.)

It results that the plaintiff is entitled to recover the amounts stipulated, to wit: $2,671.65 with interest at 6 percent from June 15, 1918; $6,508.14 with interest at 6 percent from December 15, 1919; and $2,186.15 with interest at 6 percent from December 15, 1920. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

BROOKS-SCANLON CORPORATION v. THE UNITED STATES

[No. M-152. Decided February 5, 1940]

On the Proofs

Income tax; failure to file timely claim for refund.—Where plaintiff filed no claim for refund and suit was brought after the expiration of the statute of limitations; and where the evidence shows, and the plaintiff admits, no account stated had been established, it is held that suit for recovery of overpayment of income tax cannot be maintained.

Same; account stated.—The mere statement of a credit, in a certificate of overassessment, does not create a cause of action against the Government.

Same.—A statement of an overassessment appearing in a taxpayer's account certified by the Commissioner does not constitute a promise to pay the amount thereof unless the account as a whole shows that the overassessment is due and owing to the taxpayer and that he and the representative of the Government have agreed upon the debits and credits as set out therein, in which event the certificate becomes an account stated.

Same.—The taxpayer cannot select certain items of a certificate which are in his favor and reject those which are against him and still claim an account stated upon which he can bring suit.

Same.—The essentials of an account stated are that "a balance must have been struck in such circumstances as to import a promise of payment on the one side and acceptance on the other." See *R. H. Stearnes Co.* v. *United States*, 291 U. S. 54, 65.

The Reporter's statement of the case:

Mr. Howe P. Cochran for the plaintiff. *Messrs. Lucien H. Boggs* and *William Delaware Harris* were on the briefs.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact, as follows:

1. Plaintiff was organized as the Carpenter-O'Brien Company under the laws of the State of Delaware on May 19, 1913. On December 31, 1913, plaintiff filed a certificate of amendment changing the corporate title to Brooks-Scanlon Corporation.

2. The East Coast Transportation Company (hereinafter called the East Coast) was a corporation organized on June 27, 1914, under the laws of the State of Delaware and existed until it was legally dissolved by the consent of its stockholder on June 28, 1917. All the stock of this corporation was owned by the plaintiff. The plaintiff also owned all the stock of another corporation known as the Long Leaf Pine Company.

3. At the time of the dissolution of the East Coast its assets exceeded its liabilities by over a half million dollars. Plaintiff had charge of the liquidation of the East Coast, assumed its liabilities, received the difference between its assets and liabilities, and filed for it an income tax return for the year 1917.

4. Before the dissolution of the East Coast, F. A. Rautenberg was Assistant Secretary and Treasurer of both the plaintiff and the East Coast. After the dissolution he continued in that capacity for the plaintiff and acted in that capacity for the East Coast, and he and other officers of

plaintiff signed papers for both corporations. W. F. Engel was the General Auditor for plaintiff and he handled all tax matters for both plaintiff and the East Coast.

5. Plaintiff sets out three separate counts in its amended petition, each based on an overassessment for the years 1917, 1918, and 1919, respectively. In the first cause of action, plaintiff asks for a judgment in the amount of $88,132.61; in the second cause of action, in the amount of $4,330.76; and in the third cause of action, in the amount of $14,357.16.

6. The plaintiff filed its income-tax returns for the years 1917, 1918, 1919, 1920, and 1922, and the income-tax return for the East Coast for the year 1917, and the original taxes and additional taxes of both corporations for those years were satisfied by payments, or by credits or abatements from overassessments, as hereinafter shown in Finding 9.

7. Waivers were filed from time to time for both the plaintiff and the East Coast. The last waiver on behalf of the East Coast was filed by the plaintiff as the taxpayer on February 24, 1925, to remain in effect until December 31, 1925, with a condition that if a notice of a deficiency in tax were sent to the taxpayer the expiration date then should be extended sixty days.

D. H. Blair, Commissioner of Internal Revenue, had authorized L. T. Lohman, Chief of a Section, to sign his name (D. H. Blair) to waivers with Lohman's initials. The waiver last referred to was signed "D. H. Blair, L. T. L." by a secretary in Lohman's office, who was directed by Lohman so to sign it.

8. On September 5, 1925, the Commissioner of Internal Revenue sent plaintiff a so-called 60-day letter disclosing additional taxes against plaintiff for the year 1920 in the amount of $39,449.48 and for the year 1922 in the amount of $662.63, and an additional tax against the East Coast for the year 1917 in the amount of $76,261.54. In February 1926, the first two items of additional taxes were assessed against the plaintiff and the third item of additional tax was assessed against the East Coast.

9. The three certificates of overassessment referred to in Finding 5, copies of which are attached to plaintiff's

amended petition as exhibits A, B, and C and by reference are made part hereof, were received by plaintiff immediately after May 14, 1926. The certificate for 1917 is plaintiff's exhibit A, the certificate for 1918 is plaintiff's exhibit B, and the certificate for 1919 is plaintiff's exhibit C. The overassessment in each certificate and the disposition made thereof were as follows:

(a) Certificate of Overassessment for 1917.		
Overassessment		$279, 449. 08
Abated	$151, 204. 36	
Credited to 1920 original tax	24, 380. 02	
Credited to 1920 additional tax	39, 449. 48	
Credited to 1922 additional tax	662. 63	
Credited to 1917 additional tax, East Coast, assessed Feb. 1923	33, 548. 29	
Credited to 1917 additional tax, East Coast, assessed Feb. 1926	30, 204. 30	
Total		279, 449. 08
(b) Certificate of Overassessment for 1918.		
Overassessment		4, 330. 76
Credited to 1917 additional tax, East Coast, assessed Feb. 1926		4, 330. 76
(c) Certificate of Overassessment for 1919.		
Overassessment		14, 357. 16
Credited to 1917 additional tax, East Coast, assessed Feb. 1926		14, 357. 16

10. For some time before May 14, 1926, the General Auditor of plaintiff and an auditor of the Collector's Office were engaged in going through the books of plaintiff and its affiliates and also the records of the Bureau of Internal Revenue and of the Collector's Office for the purpose of adjusting plaintiff's tax liability. Both sides were desirous of bringing the tax matter to a final settlement. It was found and determined after disposing of abatements and credits from overassessments, as shown in Finding 9, that there was due from plaintiff an additional amount of $26,285.20. Accordingly, on June 2, 1926, plaintiff paid this additional amount of $26,285.20 which was applied to the additional tax assessed in February 1926 against the East Coast for 1917.

The court decided that the plaintiff was not entitled to recover.

Green, *Judge*, delivered the opinion of the court:

The plaintiff in its amended petition alleges in the first count thereof that in or about the month of May 1926 the defendant, acting through the Commissioner of Internal Revenue, promised and agreed to pay the plaintiff the sum of $128,244.72 as a balance overpaid on its tax liability for the year 1917. Of this amount, the sum of $39,449.48 was credited to an additional tax for 1920 and $662.63 was credited to an additional tax for 1922, but no part of the balance of $88,132.61 has been paid to the plaintiff.

In the second count it is alleged that about January 22, 1925, and September 5, 1925, the Commissioner of Internal Revenue wrote the plaintiff certifying, among other things, that the plaintiff had made an overpayment of tax for the calendar year 1918 in the amount of $4,330.76. Thereafter, and in or about the month of May 1926, the defendant, acting through the Commissioner of Internal Revenue, rendered a statement to the plaintiff that its correct tax liability for 1918 was $18,514.38, and on this statement the sum of $4,330.76 was found to be due by reason of the aforesaid overassessment, which sum the Commissioner then and there promised to pay the plaintiff.

For a third count the plaintiff alleges that about January 22, 1925, and September 5, 1925, the Commissioner wrote the plaintiff, certifying that the plaintiff made an overpayment of tax for the calendar year 1919 in the sum of $14,357.16. Thereafter, in May 1926, the defendant, acting through the Commissioner of Internal Revenue, rendered a statement to plaintiff that its correct tax liability for 1919 was $31,050.19, upon which statement the sum of $14,357.16 was actually found and agreed to be due the plaintiff by reason of the aforesaid overassessment.

The plaintiff asks judgment in the total amount alleged in the several counts to be due from the defendant.

The allegations of the petition are in effect that the defendant promised and agreed, through the Commissioner of Internal Revenue, to pay certain sums admitted to be due

the plaintiff as overpayments on its taxes for the years 1917, 1918, and 1919. The evidence, however, fails to show any such promise and agreement. What the plaintiff relies on are three certificates of overassessment for 1917, 1918, and 1919, each of which showed that the amount of the overassessment had been either abated, credited on taxes of the plaintiff, or taxes assessed against the East Coast Transportation Company. (See Finding 9.) The position of the plaintiff is that the Commissioner had no right to credit any part of the assessment to taxes against the East Coast Company and that it is entitled to a refund of the amount so credited.

In a reply argument, counsel for plaintiff further states that the suit is not brought upon an account stated and it is even admitted that there was no such account. Yet this is the only possible theory upon which plaintiff could recover. Plaintiff filed no claim for refund and the suit was brought long after the expiration of the statute of limitations. Detached statements are cited from the opinion in *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, which counsel for plaintiff contends show that the mere statement in a certificate of overassessment of a credit creates a cause of action against the Government.

The decision in the case last cited has been modified and explained by the Supreme Court both in the case of *Daube* v. *United States*, 289 U. S. 367, 370, and *Stearns Co.* v. *United States*, 291 U. S. 54, 65, and it is now settled that what was said in the *Bonwit Teller case*, *supra*, was not intended to present any universal rule. In a number of actions to recover taxes paid, the taxpayers have made the same contention which is now set up by the plaintiff herein and as often as it has been made it has been denied by the courts. A statement of an overassessment appearing in a taxpayer's account certified by the Commissioner does not constitute a promise to pay the amount thereof unless the account as a whole shows that the overassessment is due and owing to the taxpayer and that he and the representative of the Government have agreed upon the debits and credits as set out therein, in which event the certificate becomes an account stated. The taxpayer, however, cannot select certain items of a certificate

which are in his favor and reject those which are against him and still claim that the certificate constitutes an account stated upon which he can bring suit. This rule has been stated by this court so many times as to make it hardly necessary to cite authorities. But see *David Daube* v. *United States*, 75 C. Cls. 633, affirmed 289 U. S. 367; *Leisenring* v. *United States*, 78 C. Cls. 171, certiorari denied 291 U. S. 682; and *R. H. Stearns Co.* v. *United States*, *supra*. In the case last cited the essentials of an account stated are defined and it is said—

> A balance must have been struck in such circumstances as to import a promise of payment on the one side and acceptance on the other.

Notwithstanding the plaintiff concedes that it cannot recover upon an account stated, it is nevertheless argued that the defendant took the plaintiff's money and applied it upon tax deficiencies of the East Coast Company which were barred by the statute of limitations and for which the plaintiff was not in any event liable. The defendant answers that the plaintiff had agreed to pay the taxes due from the East Coast Company and that the statute of limitations had been waived. To this the plaintiff in turn replies that the waivers were invalid.

The evidence shows that the plaintiff had taken over all the assets of the East Coast Company and assumed its liabilities. Even though no express agreement was made to pay the taxes of the East Coast Company, the plaintiff would stand in the position of a trustee for the payment thereof. But we need not consider whether plaintiff was liable for the taxes of the East Coast Company, or whether the waiver executed was valid. A decision can be rendered without determining any of these matters. Plaintiff sues to recover an overpayment of its taxes and must comply with the statutory requirements with reference to refunds in order to establish its right to recover. For the purposes of this case it makes no difference what the defendant has done with the money; whether it was applied on the taxes of some other company or covered into the Treasury is immaterial. In order to recover these taxes plaintiff must have filed a timely claim for refund and commenced suit within the statute of limitations. It

did neither. The only exception that could be applied to the facts in the case would be in event an account stated had been proved, and here again there is a failure of the evidence and a total failure on the part of plaintiff to make out a valid cause of action.

The plaintiff's petition must be dismissed and it is so ordered.

WHITAKER, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

ORLEANS DREDGING COMPANY v. THE UNITED STATES

[No. 41952. Decided February 5, 1940]

On the Proofs

Government contract; Mississippi River levee; failure to complete within time limit; second contract.—Where contractor, engaged under contract with the Government in constructing the Valewood and Fitler levees on the Mississippi River, by reason of inadequate equipment and unsuitable methods of operation, was unable to complete the work within the time limit prescribed by the contract, and a portion of the work was taken over and let to another contractor; it is held, on the preponderance of the proof, that the slides occurring in the Fitler loop, removed and replaced by the second contractor, were not due to the condition of material placed by the plaintiff, arising out of plaintiff's operations.

Same.—Where the weight of the embankment upon a weak foundation caused a subsidence of the Fitler loop, between stations 8100 and 8111, it is held that there is no proof that, without the digging by the plaintiff in the borrow pit below the depth provided for in the contract specifications, as modified, there would have been no subsidence; the margin of safety is not proved.

Same; delay in signing contract.—Where plaintiff signed contract containing a provision that the contract must be approved by the Chief of Engineers, U. S. Army, it is held that plaintiff waived any right it may have had to a standard form of contract, signed only by the contracting officer, and accordingly plaintiff can not complain of any delay caused by length of time required to secure the signature of the Chief of Engineers.

Reporter's Statement of the Case

Same; orders of contracting officer.—Where plaintiff contends that it was harassed and annoyed in the progress of its work due to conflicting orders issued by the contracting officer, it is held that all of these orders were reasonable and provided for in the contract.

Same; insufficient equipment.—The failure of the plaintiff to make reasonable progress, so as to complete the work within the contract period, it is held, was due to its failure to have sufficient equipment with which to perform the work.

Same; acts of contracting officer reasonable.—It is held that the evidence does not disclose any unreasonable acts on the part of the contracting officer which amounted to capriciousness or arbitrariness, either in the orders given for the borrow pits or in the manner in which the material was being placed in the levees.

Same; second contract.—Where a portion of the work was relet to another contractor, after the plaintiff had failed to make satisfactory progress, it is held that there is no material difference between the two contracts which would show that the agreement with the second contractor was not the same as that with the first contractor.

Same; liquidated damages.—Where liquidated damages were charged against the plaintiff under article 9 of the contract for failure to complete the work in time, it is held that such failure was entirely due to insufficient equipment, delay in getting dredges to the site of the work, and the method used in performing the work that caused slides, for all of which plaintiff was responsible.

Same; refusal to permit partial payments; interest.—Where refusal of the contracting officer to permit partial payments caused plaintiff to borrow large sums of money, it is held that such refusal was within the discretion of the contracting officer, and the plaintiff is not entitled to recover for interest paid; the claim is in form for damages but in substance it is for interest.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *King & King* were on the briefs.

Mr. Edgar T. Fell, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact, as follows:

1. Orleans Dredging Company, the plaintiff herein, is a corporation of the State of Louisiana, with its principal office and place of business in the city of New Orleans.

Reporter's Statement of the Case

2. On or about April 4, 1929, the War Department sent out to prospective bidders notice of proposed construction of levees, included in which were the Valewood and Fitler levees more particularly hereinafter described. The approximate date for opening of bids was stated to be June 1, 1929, the Valewood levee, 527 levee miles below Cairo, to extend from station 6628 to 6863+61, consisting of 2,500,000 cubic yards more or less, the Fitler levee, 552 levee miles below Cairo, to extend fom station 8080+40 to 8200+82, consisting of 1,500,000 cubic yards, approximately. In each case the levee was to be back of an existing levee, to be tied thereto at the ends, and material was to be procured in general from borrow pits to the riverside of the new location.

Formal invitation for bids was issued May 17, 1929. The plaintiff herein received both the notice of April 4, 1929, and the invitation of May 17, 1929, and entered its bid. The bids were opened June 17, 1929, and plaintiff was found to be the lowest bidder on Fitler and Valewood, bidding 21 cents per cubic yard on Valewood, and 25.75 cents per cubic yard on Fitler. Plaintiff had based this bid on the use of clamshell dredges, and for that reason it was unusually low. In its bid plaintiff stated that it had "the following equipment available for prosecuting the work: Clamshell dredges with long boom, 10-yd. capacity bucket, dragline excavators. Hydraulic dredges, tow boats, barges and all other equipment necessary," and that the equipment was located at New Orleans.

The day following opening of the bids representatives of plaintiff and of defendant conferred together in the office of the district engineer, U. S. Army, Vicksburg, Miss., and discussed the use of clamshell dredges on levee work. The next day, June 19, 1929, the district engineer told plaintiff's representatives that its bid would be accepted, and by letter of July 3, 1929, received in due course, plaintiff was formally notified by the district engineer that its bid of June 17, 1929, had been accepted, the contract was inclosed for plaintiff's signature, and plaintiff was informed that after completion of execution of the contract, and after approval of the contract by the chief of engineers, U. S. Army, one copy thereof would be returned to the plaintiff.

July 6, 1929, plaintiff returned to the district engineer the contract signed, and on July 15, 1929, the district engineer notified plaintiff that the signed contract had been forwarded to the Chief of Engineers, U. S. Army, for approval, requested early submission of plaintiff's program of work, and also gave notice that "on account of the emergency character of the work" plaintiff would be required to start operations at each levee, without mentioning any date. Plaintiff acknowledged receipt of this notice July 27, 1929, stating that it was prepared to begin clearing as soon as orders to proceed were received.

On August 5, 1929, the district engineer notified plaintiff by wire that the contract had been approved August 2, 1929, that work would be required to commence on each levee without delay, and requested plaintiff's program of operations. This telegram was confirmed by letter from the office of the district engineer of the same date, and in this letter of confirmation the date for completion of the work was stated to be December 6, 1930, under Article 1 of the contract.

Before award of the contract to plaintiff the contracting officer had acquainted himself with the method intended to be used by the plaintiff, that is, the placement of material wet by a clamshell dredge, and had some doubt as to its success.

3. A copy of the contract is attached to the petition as Exhibit C and is made part hereof by reference. Thereunder the plaintiff was to construct three new levees, the Fitler, the Valewood, and the Hagaman. The Hagaman new levee is not here involved. The estimated cubic yardage of earthwork in the Valewood levee was 2,500,000, in the Fitler levee, 1,500,000, at the respective prices of 21 cents and 25.75 cents per cubic yard. There was a provision for making monthly payments on estimates of completed work and, in the discretion of the contracting officer, for partial payments for incomplete embankment. Continuous lengths of levee of 500 linear feet might be accepted by the contracting officer when completed, this for the purpose of shifting liability for damage to such accepted portions from the contractor to the Government. The quantities given might be varied by not more than 20 percent. Material and right-of-way were to be fur-

nished by the United States. The contracting officer was given the power to designate the exact locality at which the work would be prosecuted. Unless otherwise directed by the contracting officer the embankment was to be started "full out to the slope stakes and be carried regularly up to the gross fill." All existing levees were required to be left intact, unless the contracting officer directed otherwise.

With particular regard to the Valewood levee, referred to as item 15, the contract specifications provided:

> Item 15—this item is advertised in five sections, the material to be procured from pits to the riverside of the new location. Tie-in levee at the upper end shall be built to the old 1914 provisional grade and equivalent section. Existing controlling levee shall be left intact at both ends. Excavation will not be permitted within 100 feet of the landside toe of the existing controlling levee. Final payment will be made on each section when dressed and sodded.

As to the Fitler levee, designated item 16, they provided:

> Item 16—will be divided into three sections, material to be procured from the riverside of the new location except on the upper and lower ends where the existing controlling levee may be used as a turnover. In completing the ends of the work, however, the contractor will not be permitted to take material from the existing controlling levee or within 100 feet of the landside toe thereof, until the remainder of the loop shall have been completed and until such time as is regarded as safe from high water and is so designated by the contracting officer. Final payment will be made on each section when dressed and sodded.

The contracting officer was district engineer of the U. S. Army engineer corps.

4. The plaintiff, on August 7, 1929, because of its desire to use clamshell dredges, requested of the contracting officer a modification of the borrow-pit specifications permitting deeper dredging, down to 12 feet, without which the use of the clamshell dredges would have been impracticable.

Accordingly, the contracting officer on August 21, 1929, in order to make it practicable for plaintiff to use clamshell

dredges, modified the borrow-pit specifications so that they provided as follows:

> Starting at 40 feet (edge of berme) from toe of new levee, borrow pits may be deepened on a slope of 1 on 2 down to a depth of 12 feet below natural surface and extending riverward on a level grade to that point where it intersects 1 on 25 pit slope, but the back of the pit shall not be within 350 feet of the center of the existing levee.
>
> All material removed below the specified borrow pit slope of 1 on 25 must be replaced before the front levee is cut down at Fitler and before final payment is made at Valewood. On both contracts payment for equivalent yardage will be withheld until the borrow pits are restored to specified slopes.

This modification enabled the plaintiff to use clamshell dredges on the work, and immediately upon receipt of the modifying order plaintiff proceeded to bring its clamshell dredges from New Orleans to the site of the work.

5. Plaintiff's clamshell dredges were floating equipment and they had to be brought from New Orleans through the channel of the Mississippi River up to a point opposite the site of the work, then through or over the bank of the river by flotation channels to old borrow pits alongside the location of the new levees.

In the middle of June 1929, the Mississippi River at the site of the work was higher than its banks. It commenced to fall in the latter part of June, and beginning the forepart of July the river was at such a stage that the dredges would have had to cut their way in through the bank.

August 7, 1929, plaintiff requested of the contracting officer permission to cut through at designated locations, one of which was through existing articulated concrete revetment. The contracting officer refused permission to cut through such revetment notwithstanding plaintiff had offered to bear the cost of replacement. This refusal of the contracting officer was based upon the physical circumstances, including difficulty of repairing that kind of revetment and the fact that a bank where revetment is necessary requires special care. There is no evidence of abuse of discretion by the contracting

officer in denying plaintiff's request. By the latter part of August 1929, the points of departure from the river and of entry on to the site were agreed to.

On August 8, 1929, plaintiff asked permission to work on Sundays and other holidays, and this permission was granted by the contracting officer August 13, 1929, and in addition the contracting officer authorized plaintiff to work at night. Both parties were anxious to get on with the work, and plaintiff could not get well into the project before the clamshell dredges had arrived at the site. And since there was to be one clamshell dredge only to each of the two projects, Fitler and Valewood, night and holiday work was necessary if the project was to be completed within a reasonable time.

6. The plaintiff had separate organizations for the Fitler and Valewood loops.

On the Fitler loop the plaintiff used the clamshell dredge *Hercules*, with a 5½-cubic yard capacity bucket. The *Hercules* left New Orleans August 21, 1929, and arrived opposite the site of the work August 30, 1929. From then on until December 7, 1929, the *Hercules* was taken by locks and dams through river bank and old levee and along old borrow pits to the site of the new levee in position to begin dredging "pay" dirt. This movement of the *Hercules* was by flotation, the dredge excavating a channel for itself, turning around, damming itself in, and raising the desired water level by pumping. The progress of the *Hercules*, from river to site of operations, was long and tedious. Three locks were used, and the dredge raised in all about 34 feet. Had it been undertaken earlier in the year the progress might have been more rapid, due to the higher level of the river, and resultant ease in getting over the river bank, but the difference in time would not have been great enough to have affected the date of completion of the whole project in the hands of an energetic contractor.

Plaintiff employed on the Valewood loop the clamshell dredge *Cairo*, with a 6-yard capacity bucket. The *Cairo* arrived opposite the site of the work September 6, 1929, where it cut in through to the site itself in much the same way

as had the *Hercules*. The *Cairo* reached its first position for levee operations, or dredging "pay" dirt, about December 24, 1929. Four locks were used for the *Cairo* and the *Cairo* was raised about 44 feet. At Valewood plaintiff profited by its experience at Fitler, and where at Fitler it cut below the natural ground surface in making a channel through the old levee, at Valewood, agreeably to the requirement of the contracting officer, it did not do so but used an extra lock.

7. The use of clamshell dredges along the lower Mississippi River, for levee construction, was comparatively new and had not yet been thoroughly tried out in that region. If successful, clamshell dredges would materially have reduced the cost to the Government of the construction of levees in the lower Mississippi Valley, and trying them out was therefore a matter of importance.

Plaintiff operated its clamshell dredges in the following manner:

The clamshell dredge excavated from a borrow pit, in this instance riverward of the levee to be constructed, and a convenient distance out from the center line of the levee. Between the riverside toe of the embankment and the edge of the borrow pit plaintiff left a natural berm 16 feet wider than called for by the specifications, or 56 feet in all. The first lift was of comparatively dry earth for the riverside slope of the levee. This was accomplished by the dredge's excavating with its bucket and long boom as far as it could reach ahead, until between the pit thus excavated and the pool in which the dredge was floating there was left a narrow dam. When the pit ahead had become deep and wide enough for flotation of the dredge the dam was demolished and its material was thrown over onto the levee. After the dredge had worked in this way a varying distance it went over the same stretch again, this time making a wet lift landward of the first and dry lift, that is, over the center line of the levee. The earth, buckshot, sand, loam, whatever it was, was taken out of the borrow pit in which the dredge was floating, or if from a dry point the earth was made wet before it was dumped to the landside. The second lift was purposely placed wet, because when in a wet condition it

would crowd down toward the landside toe, where the boom and bucket could not reach. Immediately to landward of the first and dry lift, which thus acted as a retaining wall, wet earth in the second lift would be piled on wet earth in the same lift, causing it to crowd down toward the landside toe. Where helpful, landside toe retaining dikes were built to prevent undue spreading of the deposited material. The succeeding lifts were also to be of wet material, placed to the landside over the preceding lift only after the preceding lift had dried out.

The year 1930 was one of great drought in the lower Mississippi Valley and approached ideal conditions for the use of clamshell dredges working in buckshot. Buckshot is slow in drying out. While the evidence with respect to the impregnation of buckshot with water and its drying out is contradictory, the better evidence is, and it is so found, that buckshot is fairly impervious to water; that the crowding down of the buckshot toward the landside toe was due largely to the slippery surface of the mass brought up by the bucket, not to a slushy condition of the buckshot, which is fairly impervious to water; that the base of a levee, constructed of buckshot, once wet will retain moisture for an undefined time; that wet buckshot, exposed to the air, will eventually dry out, very slowly in comparison with sand or sandy loam. The time in which it will dry out is indeterminable, and depends upon variable factors such as weather, situation, and handling.

Plaintiff had expected conditions to be such that after placing the wet second lift sufficient time would be available for it to dry out, and succeeding wet lifts could be placed, in layers, on top of the fairly dry surface of the preceding lift, until enough earth had been accumulated to warrant bringing the levee to grade and section by bulldozers, draglines, or other dry-land equipment.

As to any levee constructed of wet buckshot by the clamshell method, its freedom from slides after being brought to grade and section, topped and dressed, is uncertain. There would be a hazard attached to a levee so constructed. The best levee in this region, on the other hand, is a levee con-

structed of dry buckshot. The terms "dry" and "wet," as used to describe levee material, are not always mutually exclusive terms.

No material is placed in a levee in a wholly dry condition. "Dry" material is that material which has the lesser content of moisture, whereas "wet" material has the greater content of moisture. A buckshot levee that slides after being brought to the required grade and section has been made in whole or in part of material too "wet," or for some reason thereafter has become too "wet" for the required slope and stability.

"Wet" levee material is material that has so great a content of moisture as to be without worth for the purpose intended.

8. The contracting officer and other Government engineers employed on the work were skeptical as to the success of plaintiff's method of levee construction used on the Fitler and Valewood loops, while, on the other hand, the plaintiff's officers were anxious to demonstrate that their methods would succeed. Plaintiff's bid had been unusually low because it was based on the clamshell method, theretofore used in California, and plaintiff stood to lose on the Mississippi River project unless it could carry the clamshell method through to a conclusion.

9. On November 25, 1929, and December 19, 1929, plaintiff requested of the contracting officer partial payments, respectively, on the Fitler and Valewood loops, for incomplete stations, that is, for sections not brought up to full grade and height, in view of its method of constructing the levees in more than one lift. These requests the contracting officer refused, December 20, 1929, and December 27, 1929, respectively, until it should be demonstrated that the material placed under plaintiff's method of construction would remain in place under the additional load of topping out to full grade height. The plaintiff thereafter endeavored to get the contracting officer to change his decision. The endeavor was without success.

Beginning June 19, 1930, the plaintiff also endeavored to secure acceptance of sections of the Valewood loop that had been finished and dressed. The contracting officer refused to accept them until the borrow pit in front had been backfilled.

The refusal of the contracting officer to authorize or recommend more partial payments than he did was due to a fear on his part that plaintiff's method of operation would not be successful, and that if plaintiff were paid too much, there would be nothing against which the United States could set off any excess in cost of construction due to the necessity of reletting the work to other concerns.

10. Plaintiff proceeded with the method of construction described. On February 8, 1930, the contracting officer objected to the lack of progress made on the Fitler loop, stating that judging from the rate of progress to date the Fitler loop would not be completed before July 15, 1931, whereas the agreed date for completion was December 6, 1930, and he directed that plaintiff place on the job sufficient additional equipment to insure completion by December 6, 1930. A like order was made February 11, 1930, with respect to the Valewood loop.

11. On February 19, 1930, the contracting officer, in order to compel plaintiff to abandon its wet clamshell method of construction, and substitute therefor dry-land methods, directed the plaintiff, with respect to both loops, "to complete the levee, except dressing and sodding, in lengths not to exceed 1,500 feet as measured along the center line of the new levee."

This direction was not complied with by the plaintiff. Plantiff could not comply with it without abandoning its adopted method of construction. Without complying with it, or substantially complying with it, plaintiff could secure no partial payments. Plaintiff thereafter did endeavor to complete the levees by sections, but longer than 1,500 feet.

On March 1, 1930, the contracting officer addressed the plaintiff by letter as follows:

> I wish to call your attention to your method of construction of the Fitler new levee, i. e., the placing of wet material with a clamshell dredge, which is found to be unsatisfactory and contrary to specifications.
>
> About 4,300 feet of this levee has been constructed with the sections from 35 to 60 percent of yardage in place, which shows a number of weak sections with slides and sloughs.

> Indications are that this levee section when completed by the present method, with all slides removed, may cause subsequent high-water trouble and entail large maintenance expense due to planes of weakness occasioned by your method of construction.

At the same time, March 1, 1930, the contracting officer addressed the plaintiff with respect to the Valewood loop as follows:

> Due to your present method of construction on Valewood New Loop and also to deep borrow pits, there has occurred a number of washes along the front edge of the berm. You are, therefore, directed in future work to start cutting your borrow pits no nearer than seventy-five feet from the toe of the levee.

To have complied with this direction, plaintiff would have had to abandon its method of construction on the Valewood loop. Instead, plaintiff set up a small dyke or wall at the edge of the berm, which did away with the condition complained of.

On March 3, 1930, the contracting officer gave the following order to plaintiff, further modifying the borrow-pit specifications:

> Reference is made to a letter from this office, dated August 21, 1929, which permitted certain violations of borrow pit specifications on Valewood and Fitler New Levee contracts.
>
> The deep borrow pits occasioned by your method of construction with a clamshell dredge, are objectionable in that they may expose weak strata, induce subsidence, and endanger the future safety of the levee in time of high water.
>
> For these reasons the excavation to a depth of 12 feet below the natural surface of the ground, permitted on the Fitler and Valewood contracts by the letter referred to above, is, in the future permitted only to a depth of 10 feet below the natural surface of the ground. This depth is deemed ample for the flotation of your dredges.

This order was issued by the contracting officer because of the fact that plaintiff in instances had exceeded a depth of 12 feet in the borrow pits below the natural surface of

the ground. There is no proof of consistent overdigging by plaintiff in the borrow pits, or proof that the instances of overdigging were so numerous as to be material to any issue in this case. The order was disregarded by the plaintiff because a 12-foot depth was necessary to the efficient operation of its dredges.

12. Beginning in the early part of February 1930, the contracting officer first complained of lack of progress and demanded additional equipment. Thereafter, on April 9, 1930, the contracting officer again called plaintiff's attention to delay in the work, on both loops, demanding additional equipment sufficient for completion by the agreed date, the details of the measures plaintiff proposed to take, to insure such completion, and threatening to recommend taking the work out of plaintiff's hands under Article 9 of the contract in the event of failure to satisfy the demand for additional equipment.

Plaintiff did not comply with the contracting officer's demand for additional equipment.

13. In placing wet material on the landside of the Fitler loop the question arose as to whether the movement thereof constituted slides. Plaintiff insisted the movement was nothing more than the material coming to rest or seeking its natural angle of repose. If the movement did constitute slides it was the duty of the plaintiff to remove them. The contracting officer so considered them and ordered them removed, but thereafter, May 5, 1930, rescinded this order, and plaintiff proceeded with the second wet lift of material, over the first wet lift, without removing what the contracting officer had theretofore held to be slides, and objectionable.

14. The material used in the Valewood loop was for the most part a sandy loam, which dries out quicker than does buckshot, and the clamshell method of building this loop, as applied by plaintiff, was practicable.

At no time did the plaintiff have on the Valewood loop sufficient equipment to finish on or before December 6, 1930. The progress on the Valewood loop was not at a sufficiently rapid rate to indicate completion of the work before the year 1931.

15. The predominating material in the Fitler loop was buckshot, which is a blue clay. Buckshot is not well adapted to the clamshell method of levee construction, as applied by the plaintiff. The clamshell method requires a dry climate and earth that will readily dry out. Buckshot, once it is impregnated with water, dries very slowly.

Plaintiff's method required that each lift to the landside of the embankment be exposed long enough to drain and dry out, before another wet lift of buckshot be superimposed.

With buckshot as levee material, deposited in a wet state, plaintiff could not have finished in contract time, because of the length of time it took for the buckshot to dry out.

The interiors of all levees are more or less wet. A slide occurs where the grade is too steep for the material comprising it to stand up. Thus wet buckshot will not remain in place at the steepest slope that dry buckshot will take.

By plaintiff's method the tendency of wet earth to slide down a slope was taken advantage of to get the material down to the landside toe. The material underneath would yield to the material above. The material so crowded down did not always immediately assume its final angle of repose. Some time was required for it to settle in place. This adjustment and readjustment of wet buckshot was decided by the contracting officer to be slides, and objectionable. Notwithstanding his later decision that they could be covered up, he did not consider or decide that the condition of the material, so sliding, was satisfactory for levee construction.

16. On June 14, 1930, there was held in Washington, D. C., a conference between representatives of both contracting parties. Among those present were Lytle Brown, Major General, Chief of Engineers, T. H. Jackson, Brigadier General, Corps of Engineers, president of the Mississippi River Commission, the contracting officer, John C. H. Lee, Major, Corps of Engineers, District Engineer, all representing the United States, and for the plaintiff, its president, R. A. Perry, its engineer, Walter J. Amoss, together with counsel and others for both sides.

The subject of this conference was the work on the Fitler and Valewood loops. The Government's representatives in-

sisted on additional equipment in order that the work might be finished on contract time. The plaintiff agreed to furnish additional equipment. This agreement was reduced by the plaintiff to writing June 28, 1930, and was in writing assented to by the chief of engineers, July 3, 1930. It is as follows:

(a) Valewood contract includes:
2,350,000 c. y. net yardage. Also 400,000 c. y.
585,000 —25% excess fill. Refill of pit.

2,935,000 gross.
770,000 reported as in place.

2,165,000 remaining to do.
1,020,000 expected output dredge *Cairo*.

1,145,000 c. y. gross requirement for additional equipment namely 230,000 cubic yards per month after July 1930.

We agree to place on the Valewood job the following additional equipment by the dates given:
1 3-yd. dragline by July 1st.
1 5-yd. dragline by July 15th.
1 3-yd. dragline by July 20th.
1 5-yd. dragline by July 20th.
or equipment of equivalent capacity.

Also one 15-inch or equivalent hydraulic dredge of 120,000 c. y. capacity by August 15th to replace the back fill (400,000 c. y.) in the borrow pits.

(b) Fitler contract includes:
1,500,000 c. y. net. Also 200,000 c. y.
375,000 c. y. 25% excess fill. Refill of pit.
500,000 Rehandle.

2,375,000 Total.
700,000 Reported as in place.

1,675,000 Remaining to do.
750,000 Expected output of dredge *Hercules*.

925,000 c. y. gross for equipment for additional equipment.

We agree to place on the Fitler job the following additional equipment by the dates given below:
1 3-yd. dragline by July 15th.

> 2 5-yd. dragline by July 20th.
> or equipment of equivalent capacity.
> The above figures are based upon our expectation to place gross yardage as follows:
> By dredge *Cairo* 170,000 c. y. per mo.
> By dredge *Hercules* 125,000 c. y. per mo.
> By 5-yd. draglines 90,000 c. y. per mo.
> By 3-yd. dragline 60,000 c. y. per mo.
> By 15″ or equivalent dredge 120,000 c. y. per mo.
> The total gross output per contract, however, is to govern and not the estimated output for any particular machine.

There is no satisfactory proof that the plaintiff agreed to this arrangement under duress.

The plaintiff did not place upon the work the equipment promised and agreed to.

17. On July 21, 1930, the president of the Mississippi River Commission, Brig. Gen. T. H. Jackson, by letter notified plaintiff that under authority of the chief of engineers he had directed the district engineer (contracting officer) to take over about 520,000 net cubic yards on plaintiff's Valewood work and about 425,000 gross cubic yards on the Fitler work. The same day the contracting officer notified plaintiff by letter that both the Fitler and Valewood jobs were behind schedule, and that the equipment thereon was insufficient for completion by December 5, 1930.

On July 22, 1930, the contracting officer addressed plaintiff by letter as follows:

> In view of the fact that you have failed to prosecute the work under your contract dated July 6, 1929, symbol No. W 1106 eng. 487, with such diligence as to insure its completion within the time stipulated in the contract, you are hereby notified that, as authorized by the Chief of Engineers, U. S. Army, and as directed by the President, Mississippi River Commission, your right to proceed with the work remaining to be done between Stations 6750 and 6795, approximately 520,000 cubic yards net, on the Valewood new levee, and between Stations 8096+26 and 8138+65, approximately 340,000 cu. yds., net, on the Fitler new levee, is hereby terminated, and the remaining work under your contract between the said stations will be completed by the Government, by contract or otherwise, as may be considered most

> expedient, and any excess cost over the contract price will be charged to you.
>
> It is trusted that the remaining work under your contract will be prosecuted by you with such diligence that it will not be necessary to take over any additional portion of same.

Plaintiff at once protested against the action of the contracting officer, and appealed to the Chief of Engineers, U. S. Army, who, in letter to plaintiff August 11, 1930, sustained the contracting officer.

At the same time that these sections were taken away from plaintiff the defendant issued an advance notice to bidders of intention to advertise and relet them, and accordingly they were advertised and bids were entertained. The lowest bidder, on opening of the bids August 9, 1930, was found to be the United Dredging Co., which bid 21 cents per cubic yard on Valewood and 25.75 cents per cubic yard on Fitler, the precise bids of plaintiff on the original letting. The next lowest, complying with the terms of the invitation, was the Canal Construction Co., which bid 40 cents per cubic yard on Valewood and 56.5 cents per cubic yard on Fitler.

The bid of United Dredging Co. was rejected for the reason that plaintiff and United Dredging Co. were controlled by the same interests and if United Dredging Company's bid had been accepted the object of reletting the work would have been defeated.

The bid of Canal Construction Co. was accepted, and contract entered into therewith August 15, 1930, for levee construction work at Valewood, Stations 6750 to 6773, inclusive, estimated cubic yards 260,000 at 40 cents per cubic yard, Stations 6773 to 6795, inclusive, estimated cubic yards 260,000, at 40 cents per cubic yard, and at Fitler, Stations 8096+26 to 8138+65, inclusive, pit refill estimated cubic yards 89,200, at 56.5 cents per cubic yard, and completing levee, estimated cubic yards 250,800, at 56.5 cents per cubic yard, being the work taken away from the plaintiff as hereinbefore related. The work was to be completed by December 5, 1930. The provisions were substantially those theretofore agreed upon between plaintiff and the Government. Certain provisions were added appropriate to the situation

as changed by plaintiff's work and there was added the following:

> 39.2 (f) *Slides.*—The present incomplete embankment has been placed by a clamshell dredge. The material was placed wet and has been in place from about one to six months. All existing slides in the present embankment and slides that may occur through no fault of the contractor in completing the embankment shall be removed and the embankment restored when directed by the contracting officer, payment to be made both for removal and refill at the unit price bid for embankment.

A copy of the Canal Construction Co. contract is filed herein as part of plaintiff's exhibit No. 1 and is incorporated in these findings by reference.

18. The contracting officer August 20, 1930, in letter to the plaintiff, objected to delay in plaintiff's preparations for backfilling borrow pits, stating:

> 2. In your letter to the Chief of Engineers, dated June 28, 1930, you stated that a 15-inch hydraulic dredge, or equivalent hydraulic dredge, would be placed on this job by August 15, 1930, to place the pit refill. This dredge has not been placed on the job as promised.

The plaintiff could not place the pit refill and afterwards resume the use of clamshell dredges along the area backfilled, that is, alongside refilled borrow-pit areas, as it might be called upon to do in case the embankment anywhere proved to be unsatisfactory. It was plaintiff's plan to leave complete refilling of the borrow pits to the last, and this plan the plaintiff did not depart from. The refilling of borrow pits was to be the last operation of the clamshell dredges. Borrow pits were in fact finally refilled by the plaintiff, in part by hydraulic dredge, in part by clamshell dredge, after completion of intermediate lengths of the two levee loops had been taken away from plaintiff and given to other contractors, who did not employ floating equipment.

19. Following the reletting to Canal Construction Co. the contracting officer in writing made numerous complaints to the plaintiff of a lack of progress on the work left to the plaintiff, and of plaintiff's lack of sufficient equipment on the job to complete by December 5, 1930. The correspondence

consisted of numerous letters and telegrams between the parties, the contracting officer demanding sufficient equipment, and plaintiff giving assurances that were not satisfactory to the contracting officer. Conferences were had between representatives of both sides August 29, 1930, and September 2, 1930.

September the 9th, 1930, the plaintiff wired the contracting officer as follows:

> We offer to remove from Lake Providence Dragline Browning Number 2 and 1½ yard machine and deliver to Fitler at once to handle slide where clamshell cut through levee; this machine should complete job thirty days after starting said work. Expect sublet immediately 50,000 yards on south end of clamshell section based on work starting within fifteen days; also expect sublet at once both end sections of levee, work to start within fifteen days; all of above based on completion December sixth; any work sublet to be guaranteed by surety bond; total yardage about 320,000 cubic yards. We await your approval before subletting above; please wire or phone.

On the same day, September 9, 1930, the contracting officer wired plaintiff as follows:

> Your telegram September 9th providing for completion of your Fitler contract by December 5th is satisfactory with the understanding as agreed to in our conferences of August 29th and September 2nd that dredge cut through controlling levee be restored to full grade and section plus shrinkage and also that no material be removed from the controlling levee for the placing of 320,000 yards you will sublet. Wire me today your agreement with above and also when and to whom you are subletting the 320,000 yards so that I may at once arrange for landside borrow pits as per our conferences August 29th and September 2nd.

Also on September 9, 1930, the contracting officer wired plaintiff:

> Retel 243 P M September 9th your plan for completion Fitler contract is satisfactory pending prompt putting of this plan into effect.

The plaintiff was unable to find subcontractors with sufficient equipment to carry out this arrangement and in lieu thereof began to purchase more equipment, and so advised the

contracting officer, and kept the contracting officer informed as to the additional equipment being ordered. September 22, 1930, a conference was held between the contracting parties, including the president of plaintiff company, the Chief of Engineers, U. S. Army, and the president of the Mississippi River Commission, and plaintiff's president did not satisfy the defendant's officers as to the progress of the work, or possible progress with the equipment available. The contracting officer himself considered the equipment being brought to the Fitler job insufficient, and the progress unsatisfactory, so notified the plaintiff, and on September 23, 1930, wired plaintiff as follows:

> Inasmuch as you have failed to make satisfactory progress at Fitler under your contract dated July 6, 1929, for construction of Valewood, Fitler, and Hagaman new levees, to insure completion within time stipulated, you are hereby notified that under authority of the chief of engineers and in accordance with Article 9 of contract, your right to proceed with work on Fitler levee between stations 8138+65 and 8184+25 except pit refill is hereby terminated. Letter follows.

The work thus taken away from the plaintiff on the Fitler loop between stations 8138+65 and 8184+25 was readvertised by the Government September 23, 1930, as "removing slides and completing levee," estimated cubic yards 200,000, and formal notice to prospective bidders was issued September 25, 1930. Bids were opened October 4, 1930, the low bidder was National Dredging Company, at 28 cents per cubic yard, and contract of the Government therewith was signed October 9, 1930, with substantially the same provisions as originally carried in the contract with the plaintiff, except that the work described was completing levee, and cutting out and replacing slides. The work was to be completed December 5, 1930. A copy of this contract is filed in the case in plaintiff's exhibit No. 1, and is made part hereof by reference.

Immediately upon notice of termination of plaintiff's right to complete the work between sections 8138+65 and 8184+25, Fitler, plaintiff duly protested.

Plaintiff was not, at the time work was taken over by the Government on the Fitler and Valewood loops, prosecuting

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the work taken over with such diligence as to insure its completion within the agreed time, that is to say, on or before December 6, 1930. The clamshell dredges, after the taking away and reletting to National Dredging Co., were used by plaintiff only in the refilling of borrow pits and cutting out and replacing of slides occurring in its own work.

The reletting of the work between stations 8138+65 and 8184+25 divided the Fitler work into three sections, leaving the end sections to the plaintiff. This interfered with plaintiff's use of clamshell dredges on the Fitler New Levee.

20. Part of the Canal Construction Company's work was the cutting out and replacing of possible slides.

The Canal Construction Co. operated by use of a railroad line extending along the riverside of the Fitler loop. To make a roadbed for the rails Canal Construction Co. dug a triangular section, with base of about 20 feet, into the riverside of the embankment placed by plaintiff. Alongside the roadbed, between roadbed and center-line of the levee embankment, Canal Construction Co. excavated a ditch for the reception of levee material brought up in the railway cars, within reach of a dragline on top of the embankment, which lifted the material out of the ditch and dumped it in position.

These operations were detrimental to the stability of the embankment as placed by the plaintiff.

All slides removed and replaced by Canal Construction Co. at Fitler were to the riverside of the new loop. So much of the riverside of the Fitler loop as had been constructed by plaintiff had been of relatively dry material. The preponderance of the proof is that the slides occurring in the Fitler loop, removed and replaced by Canal Construction Co., were not due to the condition of material placed by the plaintiff, arising out of plaintiff's operations.

From amounts otherwise due the plaintiff there has been withheld by the defendant, as the cost of correcting the Fitler slides under the Canal Construction Company's contract, the sum of $129,004.43, being 63,527 cubic yards placed in levee embankment and part of plaintiff's contract work, at the difference of 30.75 cents per cubic yard between the contract rate of 56.5 cents on Canal Construction Company's work

and plaintiff's contract rate of 25.75 cents, amounting to $19,534.55, plus 193,752 cubic yards on correction of slides, exclusive of that so placed in embankment, at 56.5 cents, $109,469.88.

21. Slides removed and replaced by National Dredging Co. on the Fitler loop were generally landward, and the preponderance of proof is that as to those, the cost of which was charged to the plaintiff, they resulted from the condition or situation in which the material had been placed by the plaintiff.

For cutting out and replacing slides due to plaintiff's operations, corrective work done by National Dredging Co., there has been charged against the plaintiff and, from amounts otherwise due, withheld from it by the defendant, the sum of $63,900.56, being 117,479 cubic yards placed in levee embankment and part of plaintiff's contract work, at the difference of 2.25 cents per cubic yard between National Dredging Company's contract rate of 28 cents and plaintiff's of 25.75 cents, amounting to $2,643.28, plus 218,776 cubic yards in correction of slides, exclusive of that so placed in embankment, at 28 cents, $61,257.28.

22. All slides occurring in plaintiff's work at Valewood were removed and replaced by plaintiff, and they are not in controversy.

23. On or about November 24, 1930, during the course of Canal Construction Company's work, there was a subsidence of the Fitler loop between stations 8100 and 8111. The cause thereof was the weight of the embankment upon a weak foundation. Under the embankment there was an ancient cypress swamp, consisting of cypress stumps and soil such as quicksand, which, being in a relatively fluid state, transmitted the pressure of the levee to the riverside berm and bottom of the borrow pit, so that, as the embankment subsided, the berm and the bottom of the pit arose. The pressure forced upward the natural ground surface of the berm, and caused an upheaval in the bottom of the borrow pit opposite the subsidence.

The borrow pit alongside the subsidence had been partially refilled before the subsidence took place, and the natural berm, left by plaintiff was 16 feet wider than the minimum

carried in the specifications. There had been overdigging by plaintiff in the borrow pit as heretofore related.

There is no proof that, without the digging by plaintiff in the borrow pit below the depth provided for in the contract specifications, as modified, there would have been no subsidence, that is to say, the margin of safety has not been proved.

The means taken to correct the subsidence was to build a false berm about 8 feet thick some distance out into the borrow pit, alongside the subsidence, over and beyond the natural berm, and in addition, as a further counterweight to the levee, the borrow pit was more than refilled, and the deficiency in levee, resulting from the subsidence, was made up by additional embankment. Two attempts were made by Canal Construction Co., under supervision of the Government inspectors, to cure the condition that induced the subsidence. Whether, after the first attempt the counterweight was equivalent to that which would have been there had been no overdigging, is not the subject of proof. After the first attempt, the subsidence recurred. There was no further subsidence after the second attempt.

The defendant has charged against and, from amounts otherwise due, withheld from the plaintiff $61,651.52 for correction of the subsidence calculated as follows:

> 15,147 cubic yards placed in levee embankment and part of plaintiff's contract work, at the difference of 30.75 cents per cubic yard between Canal Construction Company's contract rate of 56.5 cents and plaintiff's rate of 25.75 cents, $4,657.71, plus 100,874 cubic yards in correction of subsidence, exclusive of that so placed in embankment, at 56.5 cents, $56,993.81.

24. The only part of the work completed on or before December 6, 1930, was stations 6750 to 6795, Valewood, by Canal Construction Co. All other work was finished after that date. Plaintiff completed work at Fitler on February 12, 1931 and at Valewood on March 12, 1931.

25. Defendant has made no payment to plaintiff for work done on the Fitler loop, but has charged against the plaintiff, and withheld therefrom from sums otherwise due, $160,059.72 on the Fitler loop, arrived at in the following manner:

The several contract prices were Canal Construction Co. 56.5 cents, National Dredging Co. 28 cents, and plaintiff 25.75

cents, per cubic yard. The total cost of the levee embankment, taken away from plaintiff, was 278,333 cubic yards at 56.5 cents, $157,258.15, and 178,806 cubic yards at 28 cents, $50,065.68, plus the cost of levee embankment placed in correcting slides and subsidences and part of plaintiff's work, 78,674 cubic yards at 56.5 cents, $44,450.81, and 117,479 cubic yards at 28 cents, $32,894.12; $284,668.76 for 653,292 cubic yards. At plaintiff's contract price of 25.75 cents per cubic yard, the cost of the entire 653,292 cubic yards would have been $168,222.69, an excess of $116,446.07.

Defendant also calculated that Canal Construction Co. had cut out and replaced 193,752 cubic yards on correction of slides exclusive of that placed in embankment and part of plaintiff's work, which at 56.5 cents would be $109,469.88, had handled 100,874 cubic yards, exclusive of that placed in embankment and part of plaintiff's work, in the correction of the subsidence, at 56.5 cents, $56,993.81, and had refilled pits to the extent of 63,840 cubic yards, for which it was entitled to $36,069.60, at 56.5 cents per cubic yard; that National Dredging Co. had cut out and replaced 218,776 cubic yards on correction of slides, exclusive of yardage in embankment and part of plaintiff's work, which at 28 cents per cubic yard amounts to $61,257.28. The sum total earned by Canal Construction Co. and National Dredging Co., aside from that going into levee embankment and part of plaintiff's work was therefore found to be $263,790.57, a total excess cost for levee embankment, correction work, and refilling of pits of $380,236.64.

The plaintiff concededly earned on the Fitler loop an amount which the defendant calculated as 25.75 cents per cubic yard on 855,056 cubic yards, $220,176.92, which, deducted from the excess cost of $380,236.64, leaves an excess of $160,059.72.

The several levee embankment yardages, made bases for payment in the foregoing manner, are substantially correct in amount, as is also the yardage of borrow-pit refill.

26. Payment has been made to plaintiff on the Valewood loop as follows:

The cubic yards of material handled by Canal Construction Co. at Valewood, for which payment was held to be due,

amounted to 530,661, and was all in levee embankment. Had plaintiff done this work at its contract price of 21 cents per cubic yard the cost to the Government would have been limited to $111,438.81. As it was, the cost to the Government was $212,264.40, an excess cost of $100,825.59.

The cubic yards handled by plaintiff, to be paid for under the contract, were 1,876,077. At the contract rate of 21 cents, this amounts to $393,976.17. Setting off against this the excess cost of $100,825.59 leaves $293,150.58. Deducting from this remainder the excess of $160,059.72 (finding 25) on the Fitler work, leaves $133,090.86.

By various Treasury checks beginning July 3, 1930, and ending September 23, 1930, plaintiff was paid $67,239.60. Thereafter there was no further payment until December 21, 1931, when plaintiff received the last check in the sum of $65,851.26, a total of $133,090.86.

27. The Valewood and Fitler new loop levees, as finally finished, varied in no essential way from the requirements of the original specifications.

28. Plaintiff's claim for recovery of liquidated damages is not satisfactorily supported by the evidence.

29. After plaintiff, Canal Construction Co., and National Dredging Co, had completed their operations, and the levee had been accepted and paid for in the manner hereinabove related, there developed in the Fitler loop between stations 8130+50 and 8138, and between stations 8173 and 8175, two slides, which were removed and replaced by the United States in 1934, the first slide at a cost of $18,719.29, the second at a cost of $1,287.21.

Canal Construction Co. had been working on the section between stations 8130+50 and 8138, and this slide was to the riverside and partly in the base of the levee, in material placed by plaintiff and which had become wet.

National Dredging Co. had been working on the section between stations 8173 and 8175, and this slide was to the riverside, and partly in the base of the levee, in material placed by plaintiff, which had become wet.

These two slides were investigated by the defendant, dug into, and it was found that the levee material got increas-

ingly wetter as the digging progressed down toward the base.

The material in the base of the levee had been deposited by plaintiff in a comparatively dry state, constituting part of the first or riverside lift.

There is no proof that these two slides were due to the condition in which material had been placed by the plaintiff, or due to plaintiff's mode of operations.

30. The other items of claim made in the petition are not sufficiently supported by testimony in the record or otherwise properly founded to warrant specific findings covering them.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the Court:

This action involves the construction of a contract for the erection of setback levees on the east bank of the Mississippi River at two points known as Fitler and Valewood. The former was 552 miles below Cairo and the latter 527 miles below Cairo and 93 miles down stream from Black Bayou. Both are situate in the Vicksburg Engineer District and were undertaken after the Jadwin plan for flood control of the Mississippi River in its alluvial valley was adopted by Congress on May 15, 1928, 45 Stat. 534, 539.

This plan included the enlargement of existing levees at certain places by increasing the height or size and the construction of new levees at other places along the river. In accordance with the Jadwin plan a preliminary survey was made which included the Valewood, Fitler, and Hagaman levees.

The Valewood levee is situate on the east bank of the Mississippi River at a point where the river flowing in a northeasterly direction makes a rather sharp turn to the south and back to a southwesterly direction. From 1909 and later years the defendant spent large sums of money in revetment work along the east bank of the river which was then determined to be an eroding bank at this place.

The Fitler levee is situate on the east bank of the Mississippi River at a point where the river flowing in an easterly

direction makes a rather sharp turn to the south and back to a southwesterly direction. At this point also from 1909 and later years the defendant spent large sums of money in revetment work along the east bank of the river which was then determined to be eroding.

The setback levees involved in this suit were both on the left bank and east of the existing levees and were to be tied into the existing levees at each end.

During the Spring of 1929 the Mississippi River had one of its greatest floods and the water was at an extremely high level. The Jadwin plan, as adopted by Congress, contemplated the building of the levees from the upper part of the Mississippi River downward as shown in the preliminary survey in 1928.

On April 4, 1929, in pursuance of this plan, defendant issued an advance notice to prospective bidders advertising projects in which were included the Valewood and Fitler items. On May 17, 1929, the United States Engineers' Office at Vicksburg, Mississippi, issued an invitation for bids to be opened on June 17, 1929, for the Valewood and Fitler new levees, the work to be completed in sixteen months.

The Valewood Levee extended from station 6628 to 6863+61, consisting of 2,500,000 cubic yards more or less, and the Fitler Levee extended from station 8080+40 to 8200+82 consisting of 1,500,000 cubic yards approximately. The material was to be procured from borrow pits to the riverside of the new location.

The plaintiff, having received both the notice of April 4, 1929, and the notification of May 17, 1929, entered its bid. When the bids were opened it was found that plaintiff was the lowest bidder for both the Fitler and the Valewood levees, having offered to do the work for 21 cents per cubic yard on Valewood and 25.75 cents per cubic yard on Fitler. The bids made by the plaintiff were unusually low because it contemplated the use of clamshell dredges with which it had been performing work in California. Clamshell dredges had never been generally used and, in fact, were even believed to be useless in the erection of levees on the Mississippi River heretofore.

Plaintiff stated in its bid that it had "the following equipment available for prosecuting the work: Clamshell dredges with long boom, 10-yd. capacity bucket, dragline excavators. Hydraulic dredges, towboats, barges, and all other equipment necessary" and that this equipment was at that time located at New Orleans, Louisiana. After the bids had been opened plaintiff's representatives conferred with the defendant at the office of the District Engineer and discussed the use of clamshell dredges on levee work.

On June 19, 1929, the plaintiff was informed that its bid would be accepted and by letter on July 3, 1929, received a formal notice from the District Engineer of its acceptance. The contract was enclosed for plaintiff's signature and there was included in the formal contract a provision to the effect that the contract would have to be approved by the Chief of Engineers of the United States Army and plaintiff was requested to execute the contract.

On July 6, 1929, the contract was duly signed by the plaintiff and returned to the District Engineer. On July 15, 1929, plaintiff was notified by the District Engineer that the contract had been forwarded to the Chief of Engineers for approval and an early submission of plaintiff's program of work was requested. The District Engineer also gave notice that "on account of the emergency character of the work" plaintiff would be required to start operations at each levee. Plaintiff notified defendant that it was prepared to proceed with the work as soon as orders were received to commence.

On August 5, 1929, the plaintiff was notified by wire that the contract had been approved on August 2, 1929, and work would be required to commence on each levee without delay and plaintiff's program of operations was again requested. Plaintiff was also notified by letter on the same day to commence work and the completion date of the contract was fixed as December 6, 1930, being 16 months from the date of notification.

The contract contained provisions for making monthly payment on estimates of completed work and, at the discretion of the contracting officer, partial payments for incom-

plete embankments, and also that continuous lengths of levee of 500 linear feet might be accepted by the contracting officer when completed, the quantities named not to be varied more than 20 percent. The contracting officer was given the power to designate the exact location at which the work was to be prosecuted and, unless otherwise directed by the contracting officer, the embankment was to be started "full out to the slope stakes and be carried regularly up to the gross fill." All the existing levees were required to be left intact unless the contracting officer directed otherwise.

The contracting officer was the District Engineer of the United States Army Engineer Corps.

In order to use the clamshell dredges the plaintiff on August 7, 1929, requested the contracting officer to modify the borrow-pit specifications to permit dredging to a depth of 12 feet in order to provide sufficient operative flotation for the use of the clamshell dredges. Without this increased depth in the borrow pits the use of the clamshell dredges would have been impracticable.

On August 21, 1929, this modification was made in the following terms:

> Starting at 40 feet (edge of berme) from toe of new levee, borrow pits may be deepened on a slope of 1 on 2 down to a depth of 12 feet below natural surface and extending riverward on a level grade to that point where it intersects 1 on 25 pit slope, but the back of the pit shall not be within 350 feet of the center of the existing levee.
>
> All material removed below the specified borrow pit slope of 1 on 25 must be replaced before the front levee is cut down at Fitler and before final payment is made at Valewood. On both contracts payment for equivalent yardage will be withheld until the borrow pits are restored to specified slopes.

Immediately upon receipt of this permission to increase the depth of the borrow pits, plaintiff proceeded to bring its clamshell dredges from New Orleans to the site of the work.

These dredges were floating equipment and were brought from New Orleans through the channel of the Mississippi River up to a point opposite the site of the work and then

had to be brought through or over the bank of the river by flotation channels to old borrow pits alongside the location of the new levees.

In the spring and early summer of 1929 the Mississippi River at the site of the work was higher than its banks but in the early part of July the river had receded to such a degree that the dredges had to cut their way in through the banks.

The plaintiff, on August 7, 1929, requested permission to cut through at certain designated locations, one of which was through existing articulated concrete revetment work, and offered to pay the cost of replacements. The contracting officer refused this request because of the physical circumstances which applied to revetment work and the care which must be exercised where revetments of banks have been made.

These revetments were concrete mats sloped from the shore over the river bank and formed a concrete side to the bank and were used for the purpose of stopping and preventing erosion of the banks. The contracting officer and plaintiff agreed to a different point of departure from the river and entry to the site for the clamshell dredges.

The clamshell dredge *Hercules*, which had a bucket capacity of 5½ cubic yards, was the one plaintiff decided to use on the Fitler loop. This dredge departed from New Orleans on August 21 and arrived opposite the site of the work on August 30, 1929. From the date of its arrival until December 7, 1929, the dredge was taken by locks and dams through river bank and old levee along borrow pits to the site of the new levee in order to be in position to begin dredging on the actual work of the contract.

The process of flotation by which the dredge had to excavate a channel for itself, turning around, damming itself in, and raising the desired water level by pumping, was a slow and tedious operation. Three locks were necessary and the dredge had to raise itself by flotation to a height of about 34 feet. Plaintiff cut below the natural ground surface in making a channel through the old levee instead of making an additional lock.

On the Valewood loop the clamshell dredge *Cairo* with a 6 cubic yard capacity bucket was used. The dredge arrived

opposite the site of the work on September 6, 1929, and the same operation was necessary as that required by the *Hercules*. Four locks were used and the dredge was raised about 44 feet and reached the site of the work on December 24, 1929. The additional lock at Valewood avoided the necessity of cutting below the natural ground surface of the bank of the river in making a channel through the old levee.

It will be seen that, although plaintiff was notified to commence work on August 2, 1929, actually the dredge did not arrive at the site of the work at Fitler until December 7, 1929, and at Valewood the dredge did not arrive in position for levee operation until December 24, 1929, or a lapse of 127 days in the first instance and 144 days in the second instance.

Although plaintiff sues on many counts and during the hearing of the case a large volume of evidence was introduced and many exhibits filed, a great many of these counts have been abandoned and the plaintiff now, in its brief, confines itself to only certain specific counts which will be taken up separately in order to show clearly in each instance the nature of the claim and to solve the question of liability for the losses alleged.

The claims which are now asserted are the following:

(1) Excess costs paid Canal Construction, Fitler (including items of "slides" and "subsidence")	$312, 312. 95
(2) Excess costs paid National Dredging Co. Fitler	67, 923. 69
(3) Excess costs paid Canal, Valewood	100, 825. 59
(4) Damage for breach, repayments	27, 716. 00
(5) Deduction as for liquidated damages	2, 130. 00
Total	$510, 908. 23

Plaintiff contends that the delay in getting to the place of operation for the actual building of the levees at both Valewood and Fitler was due to the length of time taken by the Chief of Engineers, U. S. Army, to approve the contract. The approval by the Chief of Engineers was well within the time limit of the contract. Plaintiff signed the contract when it was submitted to it with this provision and it thereby waived any right it may have had to have a standard form of contract which was to be signed only by the contracting officer. *Sun Ship Building Company*, 76 C. Cls. 154.

It is also contended by the plaintiff that when certain parts of the work were taken away this action was based on the idea that it was an emergency contract for the performance of emergency work. It is true that the geographical location of the work, being miles from the general plan and at strategic points on the river, would have cautioned any experienced engineer that it was in the nature of an emergency. Nevertheless the taking away of a portion of plaintiff's contract was not based on this reason but solely because of the fact that plaintiff was so far behind its schedule that it would be impossible to finish on the agreed contract completion date.

Plaintiff admits in its brief that during the months of December and January and part of February, owing to the necessity of training the crew, the breaking-in of the equipment, adjustment of methods to meet particular situations, and the weather conditions, it could not and did not make progress at a normal rate. Because of this condition on or about the middle of February 1930 the contracting officer began to complain of the lack of progress.

The plaintiff also contends that it was harassed and annoyed in the progress of its work due to the many conflicting orders issued by the contracting officer. All of these orders were reasonable and provided for in the contract, but it is unnecessary for us to go into the matter in order to disprove plaintiff's contention because it is admitted by plaintiff's witnesses that none of these orders was obeyed.

On or about June 14, 1930, the contracting officer recommended to the Chief of Engineers that all or part of the work on both projects be taken away from plaintiff and let to others because of the failure of the plaintiff to make satisfactory progress in the work and it was apparent that plaintiff could not, at the rate it was operating, complete the contract within the time allowed.

The Commissioner who heard the testimony in this case has found, and the Court, after a careful examination of the evidence, has confirmed his finding that the failure of plaintiff to make reasonable progress, so as to complete the work within the contract period, was due to its failure to have sufficient equipment with which to perform the work.

Plaintiff contends that it was forced in June 1930, at a conference in the Chief of Engineers' Office to supply certain special equipment in order to increase production. Plaintiff agreed to supply the equipment but totally failed to place upon the work the equipment promised at this conference.

The evidence does not disclose any unreasonable acts on the part of the contracting officer which amounted to capriciousness or arbitrariness either in the orders given for the depth of the borrow pits or in the manner in which the material was being placed on the levees.

The plaintiff asked and received permission to dig the borrow pits to a depth of 12 feet during the course of the contract and subsequently the contracting officer, feeling that this depth would cause subsidence and that a depth of 10 feet was sufficient for the flotation of the dredge, revoked this order and required the borrow-pit depth to be no greater than 10 feet. However, plaintiff paid no attention to this order and did not comply with it. As to the orders in reference to the wet material being placed on the levee by the clamshell method, plaintiff paid no attention to them, although there was a provision in the contract that no material having a tendency to slough should be placed in the levees.

Plaintiff also contends that the material which the Government was to furnish at the Fitler levee was loam and not buckshot. An examination of the specifications shows that there is no merit in this contention. Paragraphs No. 1, No. 19, and No. 38 do not guarantee the material to be loam. Paragraph 1 reads as follows:

> 1. The work to be done is on the Mississippi River in the States of Mississippi and Louisiana, and consists in building new levee to adopted tentative grade and Class A or B section (paragraph 19).

Paragraph 19 (thus referred to) provides that an A section shall have a crown of 10 feet, a riverside slope of 1 on 3, the landside slope shall contain seepage line of 1 on 6, and the governing material shall be 75% or more buckshot, and that a B section shall have a crown of 10 feet, a river-

side slope of 1 on 3½, the landside slope shall contain a seepage line of 1 on 6½, and the governing material shall be loam.

Paragraph 38 states, in part:

> 38. (a) The work to be done is on the Mississippi River and consists in building new levees at the points indicated below and as shown on Mississippi River Levee Project Sheets Nos. 11 to 13, inclusive, Survey of 1928, to adopted tentative grade and Class A or B section.

The note on the drawing states:

> Estimate based upon Class B Material which according to surface information and occasional borings is to be generally found. However, if and where sufficient Class A Material is found available the section will be reduced in conformity thereto, being within the 20% provision of paragraph 12 of the specifications.

Class B material was specified as loam and Class A material was specified as 75 or more percent buckshot. The clear intent and purpose of this notation was to give to the prospective bidders notice that a reduction would be made in the estimated yardage if Class A material were found. There is no guarantee in the note as to what class of material was to be found. Paragraph 19 clearly shows that where Class A material is used the levee has a steeper slope than where Class B material is used and the levee is smaller than the levee built with loam and therefore it was provided that in the use of buckshot material there would be made a reduction.

Under Article 2 of the contract there is a provision that, where the specifications and drawings differ, the specifications govern, and the matter is to be brought immediately to the attention of the contracting officer to be adjusted and, until adjusted, the contractor proceed at his own risk.

Under Article 4 of the contract there is a provision for "Changed conditions" stating that where subsurface or latent conditions are discovered, materially different from those on the drawings or specifications, they must be brought to the attention of the contracting officer before they are disturbed and, if he finds upon investigation that the conditions differ materially from those shown on the drawings or specifica-

tions, he shall make such changes, with the consent of the head of the department, as may be necessary. Provision is also made for an increase or decrease in cost and allowances of time for the completion of the contract.

Plaintiff did not call these alleged changed conditions to the attention of the contracting officer and therefore no action was taken under either one of these articles.

In June 1930, plaintiff was so behind in its work that a conference was held in Washington between the parties at which it was agreed that plaintiff should furnish additional equipment as it was shown that at Valewood only 770,000 cubic yards had been placed and there remained 2,165,000 cubic yards to be put in place by the contractor.

At the same conference it was shown that 700,000 yards of material had been placed at Fitler out of a total of 2,375,000, which left a balance of 1,675,000 cubic yards to be placed. This showed that the plaintiff was far behind in its work on which it had been operating for almost a year, and there remained only a period from the middle of June to the 6th of December to complete the work. On July 21, 1930, the plaintiff, having failed to put the equipment upon the work as agreed, and above recited, was notified that under Article 9 of the contract the Government would take over about 520,000 cubic yards on the Valewood work and about 425,000 cubic yards on the Fitler work. Plaintiff was also notified of its being behind its schedule both at Fitler and Valewood and that its equipment was insufficient for completion within the contract time.

On July 22, 1930, the contracting officer notified the plaintiff in writing of the termination of plaintiff's right to proceed on the work between Stations 6750 and 6795 at Valewood and between Stations 8096+26 and 8138+65 at Fitler, and that the Government would complete the work on these sections of the contract and the excess cost over the contract price would be charged to the plaintiff. At the same time the contracting officer gave advance notice to bidders of intention to advertise and relet these sections, and they were accordingly advertised and bids were entertained.

The lowest bidder was the United Dredging Company, which made a bid at the precise prices of plaintiff's rates in

its contract. The next lowest bid was made by the Canal Construction Company which offered to do the work for 40 cents per cubic yard at Valewood and 56.5 cents per cubic yard at Fitler. The Government rejected the bid of the United Dredging Company because it was an affiliate of plaintiff and controlled by the same interests and had the same officers in charge. The bid of the Canal Construction Company was accepted and a contract was entered into on August 15, 1930.

The provisions of the contract with the Canal Construction Company were practically those agreed upon between plaintiff and the Government, but, owing to the methods pursued by the plaintiff in putting wet material in the levees, which caused the contracting officer to believe there would be slides, it was necessary to make a provision in this contract covering any work occasioned by the improper work done by the plaintiff. In other words, the Government simply made provision in this new contract that, if there should occur slides and work which was not properly performed under plaintiff's contract, this new contract would cover the additional work as well as the actual amount of yardage taken away from the plaintiff.

There is no material difference between the two contracts which would show that the agreement with the second contractor was not the same as that with the first contractor. A provision for slides and faulty work was incorporated in the original contract and plaintiff would have had to perform this work if it had completed the contract and the defects had been discovered during the progress of the work or even after completion.

Plaintiff's contention that the two contracts varied materially cannot be sustained.

After the reletting of the portion of the work to the Canal Construction Company, the contracting officer made numerous complaints to the plaintiff about the lack of progress of the work left on the original contract and its failure to supply sufficient equipment to complete within the time limit of the contract. The contracting officer demanded sufficient equipment and held conferences relative thereto during the latter part of August and the first part of September.

Following these conferences plaintiff agreed to put additional equipment at Fitler in order to fill in the opening where the clamshell dredge had cut through the original levee, and notified the contracting officer that it would sublet a large amount of the yardage on the southern end of clamshell section and also sublet the work on both ends of the levee. This was satisfactory to the contracting officer with the condition that the cut through the controlling levee be restored to the full grade, the shrinkage be provided for and no material be removed from the controlling levee through any subletting.

Plaintiff was unable to get subcontractors with sufficient equipment to carry out this arrangement and began to purchase more equipment and so advised the contracting officer. A conference was held in the latter part of September but the assurances given by the plaintiff were not satisfactory to defendant's officers as to the progress of the work which had been done or as to the probable progress with the equipment available.

The contracting officer notified plaintiff that the equipment brought onto the job was insufficient and the progress of the work unsatisfactory, and that, under Article 9 of the contract, the work on Sections 8138+65 and 8184+25 excluding the pit refill would be taken away from plaintiff.

The defendant readvertised for bids on the sections thus taken away, including the removing of slides and completion of the levee, and formal notices were issued to prospective bidders on September 25, 1930. The bids were opened on October 4, 1930, and award was made to the National Dredging Company at a price of 28 cents per cubic yard, and the contract was signed on October 9, 1930. This contract was substantially the same as that with the plaintiff but with the addition that there was a provision for cutting out and replacing slides which might occur in the work which plaintiff had performed.

At the time this work was taken over, plaintiff was not prosecuting the work with such diligence as to insure its completion within the contract time. Plaintiff used the clamshell dredges in refilling borrow pits and cutting out and replacing slides incurred by its own work. The taking away of these

sections of the work left only the end sections of the Fitler new levee on which clamshell dredges could work.

The Canal Construction Company cut away about 20 feet of the base of the river side of the embankment which had been placed by the plaintiff in order to form a road bed for its railroad between the levee and the borrow pits, and excavated a ditch for the levee material brought up in the railroad cars so that it could be reached by dragline and brought to the top of the embankment. The riverside part of the Fitler loop constructed by the plaintiff was of relatively dry material and the slides which the Canal Construction Company removed were to the river side of the loop. There is no convincing proof that these slides were due to the material which had been placed in the embankment by the plaintiff.

There has been charged against and collected from the plaintiff by the defendant $109,469.88 for correction of the Fitler slides, being 193,752 cubic yards at the Canal Construction Company's rate of 56.5 cents per yard. The evidence does not sustain the defendant's contention that the plaintiff was responsible for the slides, and it is entitled to recover the amount so charged and collected.

In the National Dredging Company contract on the Fitler levee the slides were generally landward. Plaintiff's method of operation by the clamshell dredge was to remove the dry earth to the length of the boom of the dredge and place it on the riverside section of the levee leaving a dam between the flotation pit and the pit so excavated. After this dry material was so placed, the excavated pit would be flooded by the breaking of the dam and the clamshell dredges would continue the work in the new pit thus flooded. Earth excavated from dry land was placed on the riverside slope of the levee, forming practically a retaining wall, and earth excavated from below the surface of the water was placed on the landside slope of the levee. The latter, being of wet material, large moist lumps of buckshot, was supposed to slide down of its own weight to the toe of the levee. These large lumps did slide of their own weight and would shove other lumps so deposited towards the landward toe but, being of large dimensions and saturated with water, pockets would form which would fill with water. The lumps were not

broken up so as to dry out. The depositing of these large lumps under this method formed surfaces which, when covered up, would not appear to be defective but ultimately would smooth out, slide gradually, and not cohere together. The wet buckshot thus deposited on the landside of the levee would take a great length of time to dry out and when covered up would sometimes not dry out in sufficient time to prevent slides.

The attention of plaintiff was repeatedly called to this condition and it was warned that the method being used of so depositing wet material might cause the lumps to ultimately occasion the slides. Slides did occur because of the placing of the material by the plaintiff under this method. The National Dredging Company was required to cut out and replace these slides, which were solely due to the plaintiff's operations, and plaintiff was charged the sum of $61,-257.28 for this work, being 218,776 cubic yards placed in the levee embankment at the National Dredging Company's rate of 28 cents. Defendant was correct in charging against the plaintiff this amount as it was work which plaintiff would have had to correct under its own contract.

On November 24, 1930, there occurred a subsidence of the Fitler loop between stations 8100 and 8111. A subsidence is a dropping down or sinking of the levee accompanied by a rising up of another portion of the terrain. Defendant claims that this was due to the overdigging of the borrow pits on the riverside of the levee and the breaking of the restraining overlying strata of buckshot which would have sustained the weight of the levee. However, the Canal Construction Company had taken away a large section of some 20 feet of dry material from the riverside base of the levee. The evidence does not bring conviction that the overdigging of the borrow pits was the real cause of this subsidence.

Underlying the embankment was an ancient cypress swamp consisting of cypress stumps and soil such as quicksand, which, being in a relatively fluid state, transmitted the downward pressure of the levees upward to the riverside berm and the bottom of the pits, causing both berm and bottom of borrow pit to rise. The borrow pits alongside the subsidence had been partially refilled before the subsidence

took place and the natural berm left by plaintiff was much wider than the minimum carried in the specifications. There is no question that there was overdigging in the borrow pits. The evidence is inconclusive that it was uniform but shows that the overdigging was sporadic. The proof does not bring conviction that this subsidence would not have occurred had the borrow pits not been overdug sporadically. The history of levee construction on the Mississippi River shows that subsidences have occurred when there has been no overdigging.

Correction of this condition was made by the Canal Construction Company and charged by the defendant against the plaintiff in the sum of $61,651.52. Plaintiff is not liable for this entire amount but is entitled to recover that sum less the excess cost of placing 15,147 cubic yards in the levee embankment, which was part of its contract, or the sum of $56,993.81.

Although the contract provided for a completion date on December 6, 1930, plaintiff did not finish the portions which were left to it for completion on the Fitler loop until February 12, 1931. The portions left to plaintiff on the Valewood loop were not finished until March 12, 1931.

There was charged against plaintiff liquidated damages under Article 9 of the contract for failure to complete the work in time, which was entirely due to plaintiff's failure to provide sufficient equipment, its delay in getting the clamshell dredges at the site of the work, and the method which it pursued in performing the work which occasioned slides. There can be no recovery on this item. *Henry A. Wise, Trustee in Bankruptcy of Ambrose B. Standvard* v. *The United States*, 52 C. Cls. 400.

Plaintiff also claims damages for breach of contract and seeks interest of $27,716.00 because of failure of the contracting officer to allow partial payments which caused plaintiff to borrow large sums of money in order to perform the contract. In each instance where partial payments were denied, the contracting officer was simply exercising his discretion in not making payments because of the method pursued by plaintiff in the performance of the work and its failure to complete any sections under the terms of the contract.

which would entitle it to partial payments. Furthermore, in form, the claim is for damages but in substance it is for interest. None of the cases cited by plaintiff is apposite. In the case of *Myerle, Exr.* v. *United States*, 33 C. Cls. 1, 25, this court held:

> As to the interest on borrowed money: The delay forced the contractor to borrow money to carry on his contract; for this he was forced to pay interest, an extra expense. The recovery of this sum in this court is forbidden by statute; whether it be claimed in the guise of a damage caused by delay, or in some other form, it remains in fact a claim for interest, and such a claim we are prohibited from allowing (Rev. Stat., 1091). The distinction by plaintiff sought to be made, is one of terms only, not of substance. If plaintiff had used his own money and so lost the interest which it might have earned for him, the claim would have been as meritorious, but would not have differed in principle from that now made.

After the work had been completed and accepted certain slides occurred which defendant claims were due to faulty work on the part of the plaintiff and a counterclaim, for the purpose of collecting the amount which it cost to have these slides corrected, has been interposed. The evidence does not carry conviction that these slides were due to the work of the plaintiff and the counterclaim is therefore dismissed.

We have discussed this case tediously at length because of the large record, the great number of exhibits and the length of time taken to try the case.

Plaintiff is entitled to recover the following items:

Correction of slides (Finding No. 20.)	$109,469.88
Correction of subsidence (Finding No. 23.)	56,993.81
	$166,463.69

Judgment will be entered for the plaintiff in the amount of $166,463.69. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge,* concur.

WHITAKER, *Judge,* took no part in the decision of this case.

HENRY MUELLER AND FRED W. HUBER, TRADING AS MUELLER-HUBER GRAIN CO. v. THE UNITED STATES

[No. 42501. Decided February 5, 1940]

On the Proofs

Government contract; delivery of hay to Army post.—Where under a contract for the delivery of hay to Army post, plaintiffs were required to make delivery of the number of tons of hay called for within a reasonable time, or as needed by the Government, not to exceed 15 tons a day, it is held that 6 months was a reasonable time for compliance with the contract and letters from the defendant to plaintiffs, asking for delivery, are sufficient to show that defendant needed the hay, and accordingly plaintiffs were in default.

Same; date of execution of contract.—Where contract for delivery of hay to Army post called for delivery of a certain number of tons during March, beginning March 15, at a rate not exceeding 15 tons a day, and delivery schedule provided that the balance should be delivered at the same rate during April and May, effective April 1 and May 1, but contract was not executed by the Government until March 27, it is held that plaintiffs were not in default when the contracting officer of the Government so declared on April 4, and such action by the contracting officer operated to breach the contract.

Same; extension of time for performance.—The contract did not become effective until it was executed by the defendant on March 27 and that date operated also to extend the contract time for performance by the number of days between March 18, when the contract was forwarded to plaintiffs and March 27, when it was executed by the defendant.

Same; rejection by inspector.—Where hay delivered by the plaintiffs to Army post under contract complied with the provisions of the contract and with Department of Agriculture specifications but was rejected by the Army hay inspector and upon analysis was found to comply with the specifications, it is held that such rejection was improper and unauthorized, and was a breach of the contract on the part of the defendant.

The Reporter's statement of the case:

Mr. M. Walton Hendry for the plaintiff.

Mr. Herbert A. Bergson, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

In September 1929 and March 1930, plaintiffs entered into three contracts with the Government through the Quartermaster Corps of the Army for the delivery by plaintiffs at certain Army posts of a certain number of tons of feeding hay and bedding hay. Before the number of tons of hay called for by these contracts, acceptable to the Army inspectors, had been delivered by plaintiffs, the contracting officer declared plaintiffs in default and proceeded to purchase a sufficient number of tons of hay in the open market to fulfill the quantities called for by the contracts at a price in excess of the contract price and charged the same to plaintiffs. The total of the excess prices paid for the hay by the contracting officer under the three contracts involved was $1,416.15. In this proceeding plaintiffs seek to recover the amount so charged against them.

The defendant interposes a counterclaim for a like amount.

The court, having made the foregoing introductory statement, entered special findings of fact, as follows:

1. The plaintiffs are citizens of San Antonio, Texas, where they are engaged as dealers in hay and grain, trading under the firm name of Mueller-Huber Grain Company.

2. On September 17, 1929, the plaintiffs entered into a contract with the defendant known as contract No. *W 503 q m 6218*, a copy of which is filed as Exhibit No. 1, and made part hereof by reference.

Among other things the contract provided that plaintiffs should furnish and deliver hay to the post quartermaster at Fort Clark, Texas, as follows:

> (1) 1,285 tons of feeding hay at a price of $15.65 per ton (baled 2,000 pounds to the ton) f. o. b. hay sheds, Fort Clark, Texas. Deliveries were to commence October 1, 1929, and were not to exceed 15 tons per working day.
>
> (2) 458 tons of bedding hay or straw (contractor's option) at a price of $14.70 per ton (baled 2,000 pounds to the ton) f. o. b. hay sheds, Fort Clark, Texas. Deliveries were to commence October 1, 1929, and were to be completed at a rate not exceeding fifteen tons per working day.

Reporter's Statement of the Case

3. On November 14, 1929, the quartermaster supply officer at Fort Sam Houston, Texas, wrote plaintiffs stating that they were delinquent in effecting deliveries of bedding at Fort Clark applying on contract No. *6218*, and that unless immediate action was taken to effect deliveries in accordance with the terms of purchase resort would be had to the open market.

A similar letter was written December 18, 1929, setting forth delinquencies at Fort Clark of hay, feeding and bedding.

4. On March 12, 1930, the plaintiff signed a contract with defendant known as contract No. *W 503 q m 6961*, a copy of which is filed as Exhibit No. 2 and made a part hereof by reference. This contract was signed by the defendant through its contracting officer on March 27, 1930. Among other things the contract provided that plaintiffs should furnish and deliver hay to the quartermaster at Fort Clark as follows:

402 tons of feeding hay at a price of $17.30 a ton (baled 2,000 pounds to the ton) f. o. b. hay sheds, Fort Clark; delivery of 140 tons to be made during March at a rate not to exceed 15 tons per working day, effective March 15, 1930, and to be completed March 31, 1930, and delivery of 262 tons to be made during April 1930 at the same rate, effective April 1, 1930, and to be completed by April 30, 1930.

5. The property officer at Fort Clark wrote the plaintiffs March 25, 1930, as follows:

> There remains due under contract No. *6218*, two hundred four thousand six hundred (204,600) lbs. hay feeding and five hundred thirty-two thousand four hundred forty (532,440) lbs. of hay bedding. Information is requested as to how soon we may expect completion of this contract.
>
> Information is requested as to when we may expect you to begin deliveries on contract No. *6961*, as we will soon be short of hay feeding.

6. Plaintiffs replied March 27, 1930, that according to their records they had shipped enough feeding hay to complete the old contract and five or six cars on the new contract, and that as to the bedding hay they understood Fort

Clark was not in a hurry for it, that it would be satisfactory to delay shipments until the latter part of April but that if immediate shipments were desired they would be effected.

The assistant quartermaster at Fort Clark wrote the plaintiffs March 28, 1930, that his office had no authority to extend the time of delivery beyond March 31, 1930, on contract *6218*.

7. On April 1, 1930, of the hay required under contract *6218* 10.565 tons of feeding hay and 262 tons of bedding hay remained undelivered. On that date also, of the hay required under contract *6961* none had been delivered.

8. On April 2, 1930, the division quartermaster at Fort Sam Houston wrote plaintiffs informing them that the quartermaster at Fort Clark was being authorized to purchase feeding and bedding hay deficient in the deliveries on contracts *6218* and *6961*.

On the same day plaintiffs telegraphed the quartermaster at Fort Clark protesting against any such purchase, asserting that enough hay was in transit to complete March deliveries. The plaintiffs followed this telegram with a letter repeating their protest.

9. On April 4, 1930, the quartermaster at Fort Clark, by order No. *7108*, purchased against contract *6218* 10.565 tons of feeding hay at $18 a ton and 262 tons of straw or hay bedding at $15.50 a ton, and by order No. *7107* against contract *6961* 129.435 tons of feeding hay at $18 a ton.

Copies of these two purchase orders are filed as Exhibits Nos. 3 and 4 and are made part hereof by reference thereto.

On the same day the plaintiffs telegraphed the quartermaster at Fort Clark as follows:

> The following cars of hay are shipped to you WAB 76052, AT 46846, AT 123600, AT 27881, AT 34379, AT 29192, AT 44990, AT 43840, AT 130117, AT 36532 in addition to the above cars two cars delivered yesterday and four cars should be on track today this more than completes delinquent amount have information that you have over 5,000 bales feeding hay on hand yesterday stop have wired Quartermaster General protesting any purchase made against our contract.

10. The evidence does not show what happened to these cars. On April 8, 1930, the plaintiffs wrote to the quartermaster supply officer at Fort Sam Houston again protesting against purchases against their contracts and alleging that Fort Clark at the beginning of April had a supply of feeding and bedding hay on hand sufficient to last many days; that the purchase orders of April 4, 1930, were unfairly issued; that deliveries were being received on plaintiffs' contracts at the very time that deliveries were being received on the purchase orders of April 4, 1930, and requesting an investigation of the matter.

April 10, 1930, the plaintiffs again wrote the quartermaster supply officer at Fort Sam Houston alleging that contract *6218* provided no time limit for completion of deliveries, that as a matter of fact when the purchase order of April 4, 1930 (being No. *7108*) was issued against contract *6218* the quartermaster at Fort Clark had on hand between 8,000 and 10,000 bales of bedding hay; that as to the purchase against contract No. *6961*, 144 tons of feeding hay had been delivered at Fort Clark between March 15 and April 1, 1930, which could have been applied on contract *6961* as they were not delinquent on contract *6218*.

11. The quartermaster supply officer replied to this April 11, 1930, without claiming any time limit for completion of deliveries on contract *6218* but alleging nevertheless delays in deliveries and refusing to accept any more deliveries on that contract.

12. On April 28, 1930, the quartermaster supply officer at Fort Sam Houston transmitted to plaintiffs a copy each of purchase orders Nos. *7108* and *7107*, and requested remittance of $234.43 excess cost on order No. *7108* and $90.60 on order No. *7107*.

13. April 30, 1930, the plaintiffs transmitted a written appeal to the Secretary of War as follows:

> Herewith hand you copy of purchase orders numbers *7107* and *7108* just received today from the Quartermaster Supply Officer at Fort Sam Houston, Texas, also copy of letters received from the Quartermaster Supply Officer at Fort Sam Houston, Texas. We are also attaching a copy of our letter to the Corps Area Quartermaster at Fort Sam Houston.

This matter certainly ought to be thoroughly investigated. If Quartermasters are permitted to discriminate against contractors and make open-market purchases which are irregular, unnecessary, and unfair, it will soon discourage contractors from bidding on Army contracts.

It seems that a trap was set for us, when this contract was taken, by one of our competitors, and the first opportunity the Quartermaster had, a purchase was made against our contract. The writer personally visited Fort Clark the day after this purchase was supposed to have been made and found a large supply of Feeding Hay on hand, sufficient to carry the post for thirty days, and sufficient Bedding Hay on hand to carry the post for at least six months. This particular competitor is a resident of Brackettville near Fort Clark and has been supplying this post with hay for many years because the Quartermaster heretofore specified Johnson Grass Hay. This competitor had a large Johnson Grass Hay field, and it was impossible for an outsider to ship this class of hay to Fort Clark; for that reason this contractor was able to sell his hay to the Quartermaster at Fort Clark at $3.00 to $6.00 per ton higher than other hay of equal feeding value could be shipped to Fort Clark. After the Government changed their specifications and purchased the various kinds of No. 2 Hay including No. 2 Prairie, this particular contractor has not been able to sell his hay at Fort Clark.

This competitor has worked against us in many ways to cause us trouble on our deliveries, causing us to pay demurrage and finally persuaded the Quartermaster to purchase against our contract 262 tons of Bedding Hay and 140 tons of Feeding Hay, which amount we were not delinquent under our contract, at a price in excess of the price we had sold this hay to the Government. You will note that the Bedding Hay was purchased for April and May deliveries, and we were notified to discontinue shipments on April 1st, that shipments made by us after April 1st would not be accepted. This contractor expects to complete these deliveries with new-crop hay on which of course he can make a profit of several dollars per ton.

It certainly is unfair for any Quartermaster to discriminate against a contractor in this way. We do not believe the Government would approve of any such methods of purchasing against a contract when the contractor is not delinquent. Had we been delinquent even then the method used by the Quartermaster was not open and aboveboard.

The purchase order was made out to Mr. H. H. Ford of Houston, Texas, but Mr. T. J. Martin of Brackettville is the man that is delivering the hay and is responsible for this purchase. We have been delivering hay to the Army for fifteen years and have never, up to this time, had any Quartermaster to make a purchase against any contract in this manner. To say that the method used is unfair does not fully cover the ground.

We requested in our letter to the Corps Area Quartermaster several weeks ago that an Inspector from the Inspector General's office be sent to Fort Clark to make an investigation. We feel sure that if such an Inspector be sent to Fort Clark that he can secure from citizens in Brackettville, which adjoins the post, more than sufficient information to prove any charges made by us.

On the same date the plaintiffs wrote the corps area quartermaster at Fort Sam Houston the following:

Herewith hand you copy of purchase orders numbers *7107* and *7108*. You will notice that purchase order *7107* covers a purchase of 129.435 tons of hay feeding purchased from Mr. H. H. Ford, F. O. B. cars Fort Clark, at $18.00 per ton to be delivered during the month of April as required by the Quartermaster at Fort Clark, Texas.

This purchase is not in accordance with the terms of our contract. We notified the Quartermaster at the time this purchase was being made that this purchase was irregular, unnecessary, and unfair. You will notice that the purchase was made F. O. B. cars Fort Clark and not F. O. B. Government hay sheds as provided for in our contract.

You will also notice that this hay was not purchased for immediate delivery, but was purchased to be delivered during the month of April as required by the Quartermaster at Fort Clark. We understand that this contract has not been completed up to this date. The contract against which the purchase was made was for March delivery, and any purchases made against a contractor when delinquent should be made for immediate delivery.

You will notice that purchase order *7108* under which the Quartermaster purchased from Mr. H. H. Ford of Houston, Texas, ten tons of Hay Feeding, No. 2 Prairie, and 262 tons of straw or Hay Bedding at $15.50 per ton is F. O. B. cars Fort Clark, Texas, the hay feeding to be delivered during the month of April, Hay Bedding to be delivered during the month of April and

May 1930 as required by the Quartermaster at Fort Clark.

The Quartermaster purchased Hay Bedding to be delivered during April and May when we were not delinquent under our contract, and the Quartermaster had a large supply of Bedding on hand. According to the purchase order you will notice that the Quartermaster was not in need of Feeding or Bedding Hay otherwise he would not have purchased this hay for April and May delivery but would have required immediate delivery. He was no doubt favoring a certain competitor of ours who has been trying for months to sell hay Feeding and Bedding against our contract. Both of these purchases were made by the Quartermaster when it was unnecessary to make same.

We have always completed our contracts and would have completed this contract had we been given a chance to do so. According to the letters received, this purchase was made on April 3rd and today, April 29th, we received the purchase order dated April 4th. The contract has not been completed and under the terms of this purchase order the contractor will not have to complete his deliveries until May. The Quartermaster at Fort Clark is certainly giving the contractor plenty of time to make these deliveries. We feel sure that the party to whom this contract was given will wait until the new crop of hay is available before he completes this contract. The way this purchase was made it is clear to us that the Quartermaster was favoring a competitor of ours in finding a market for his hay. Such practices are not in accordance with fair dealings and good fair business methods and should not be permitted.

We refuse to be responsible for any loss sustained by the Government on account of this purchase, and in addition to this we have already filed our claim with the Secretary of the War Department for something like $1,200.00 as our profit which we would have made had we been permitted to complete our contract as per schedule.

We are forwarding a copy of this letter to the Finance Officer at Fort Sam Houston and to the Secretary of the War Department, also a copy to the Comptroller General. We feel we have been grossly mistreated and discriminated against.

14. Thereafter, May 3, 1930, the plaintiffs submitted their case to the Comptroller General of the United States for adjustment. The Comptroller General, after correspond-

ence, stated an account against the plaintiffs November 14, 1931, of $259.22, as follows:

> Balance of excess cost due the United States because of delinquent delivery of hay, under contracts Nos. *W–503 qm–6218*, dated September 17, 1929, and *W–503 qm–6961*, dated March 12, 1930, whereby it was necessary for the Government to purchase supplies in the open market against the contractor's account as follows:
>
> Open market purchase from H. H. Ford, Houston, Texas, under contracts *W–503 qm–7107*, dated April 4, 1930, and *W–503 qm–7108*, April 4, 1930.

129.435 tons hay, feeding at $18 per ton	$2, 329. 83	
10.565 tons hay, feeding at $18 per ton	190.17	
262.00 tons hay, bedding at $15.50 per ton	4, 061. 00	
Total		$6, 581. 00
Contract price of Mueller-Huber Grain Co.		
129.435 tons hay, feeding at $17.30 per ton	$2, 239. 23	
10.565 tons hay, feeding at $15.65 per ton	165. 34	
262.00 tons hay, feeding at $14.70 per ton	3, 851. 40	
Total		6, 255. 97
Total excess cost		325. 03
Less set-off by certificate No. 0238308 dated September 30, 1930		65. 81
Balance due the United States		259. 22

February 3, 1934, the Comptroller General withheld from monies otherwise due plaintiffs the sum of $259.22, theretofore stated against plaintiffs November 14, 1931, and no part, either of the sum of $65.81, referred to in the statement of November 14, 1931, as having been set off September 30, 1930, or of the sum of $259.22, so withheld, has been paid by the defendant to the plaintiffs.

15. September 18, 1929, the plaintiffs signed a contract with the defendant known as contract No. *W–503 qm–6224*, a copy of which is filed as Exhibit No. 6 and by reference made a part hereof. It provided that the plaintiffs should furnish and deliver hay to the Division & Post Quartermaster, Fort Sam Houston, Texas, as follows:

> (1) 800 tons of feeding hay at a price of $12.60 per ton (baled 2,000 pounds to the ton) F. O. B. cars Fort Sam Houston, Texas, deliveries to commence October 1st, 1929, and to be delivered during the month of October at the rate of four cars per working day.

Reporter's Statement of the Case

(2) 800 tons of feeding hay at a price of $12.90 per ton (baled 2,000 pounds to the ton) F. O. B. cars Fort Sam Houston, Texas, deliveries to commence November 1st, 1929, and to be delivered during the month of November at the rate of four cars per working day.

The grades of hay to be furnished were to conform "with United States Army Specification No. 24–6–D and with the Official Hay Standard of the United States, promulgated by the Secretary of Agriculture."

The Official Hay Standard contained the following provision:

1. Timothy and clover hay, etc.—

(a) Timothy and clover hay, alfalfa and alfalfa mixed hay, grass hay, and mixed hay shall conform to one of the United States grades, as promulgated by the Secretary of Agriculture, effective July 1, 1927, with such changes as are in effect on the date of invitations for bids.

The date of the invitation for bids for this contract was August 15, 1929.

The specifications for grades of United States Nos. 1, 2, and 3 upland prairie hay as promulgated by the Secretary of Agriculture, with particular reference to the percentage of green color required, and with such changes as were in effect August 15, 1929, were as follows:

U. S. Grade No.—	Percentage of green color	Maximum percentage of foreign material
1	60 or more	10
2	35 or more	15
3	Less than 35	30

August 23, 1929, the Secretary of Agriculture promulgated an amendment, known as Amendment No. 2, to the official hay standards which was to become effective November 1, 1929. This amendment reduced the minimum of green color requirement of grade No. 1 from 60 to 50 percent. The minimum green color required for grade No. 2 was not changed. As a result of the reduction in the minimum color requirement in grade No. 1 the maximum percentage of green color for grade No. 2 was changed from 60 to 50 percent.

Contract *6224* contained the following provisions:

> The certificate of a Federal hay inspector as to grade will be final unless there is an obvious error and provided the hay at the time of final acceptance is found not to be heating, wet, moldy, or musty. In order to receive consideration, the Federal certificates referred to above must be furnished to the receiving officer before or at the time of delivery of the forage.
>
> In case shipments are not completed within the time specified in purchase orders, contracts, schedule "A", or calls, the Government, at its option, may, unless the contractor is prevented from fulfilling his contract, directly due to acts of God, of the public enemy, or specific acts of the United States:
>
> (A) Purchase in "open market" a quantity equal to the amount delinquent and charge the excess cost, if any, against the contractor.
>
> (B) If open-market purchases are made under par. 12 (A) hereof, the quantities so purchased will be applied as deliveries under the contract and the total quantity which the contractor will be permitted to deliver will be the difference between the quantity contracted for and the quantity or quantities purchased in open market.
>
> Contractors will be required to deliver forage of the grades specified in the proposal and no grade will be accepted other than that specified in bid and contract. Contractors will be notified at once by telegraph, at their expense, of rejections.

The standard Government form of bid, which was made a part of the contract, contains the following provisions:

> *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned, whose decision shall be final and conclusive upon the parties hereto as to such questions of fact. In the meantime, the contractor shall diligently proceed with performance.
>
> (a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved or his assistant.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative.

Under the provisions of the contract, final inspection and acceptance of the hay to be furnished were to take place at the point of destination in accordance with the specifications and standards referred to in this finding.

16. The following instructions with respect to the inspection of hay and straw were issued by the office of the Quartermaster General:

> 2. *Hay and Straw* (a) *Federal inspection at point of origin.*—A complete inspection prior to delivery of hay and straw will be made, wherever practicable, by a Federal hay inspector. When so inspected by a civilian Federal hay inspector, the hay or straw will be accepted at destination at the grade determined by the inspector, unless there is an obvious error in the grading, in which case the Quartermaster General should be advised and his instructions awaited before accepting the hay or straw. In this connection it should be noted that Federal hay inspectors issue both complete and partial inspection certificates, but complete inspection certificates only are acceptable under these provisions.
>
> (b) *Army inspection by licensed inspector.*—When hay or straw is inspected prior to delivery or at destination by a veterinary officer licensed as a Federal hay inspector, his inspection is final when forage is accepted. If he rejects the hay or straw and the contractor is dissatisfied with his grading, the inspector will make a complete reinspection, if the contractor so requests and agrees to bear all labor or other costs in connection therewith in case the forage is finally rejected. If the contractor is still dissatisfied with the inspection, he may then appeal to the Department of Agriculture through the office of the Surgeon General; or, if both parties can agree on a representative sample or samples of the forage, the same may be sent to any Federal hay inspector, either Army or civilian, for grading, and if either party is dissatisfied with such grading, an appeal may be taken to the Department of Agriculture.
>
> (c) *Army inspection by unlicensed inspector.*—When hay or straw is inspected by an Army inspector not licensed as a Federal hay inspector and such inspector

accepts the forage, his inspection is final. If such Army inspector rejects the forage after inspection, and the contractor is dissatisfied with the grading, the contractor may call on the nearest Federal hay inspector for a complete inspection, and if either party is dissatisfied with the grading of such Federal inspector, appeal may be made to the Department of Agriculture. Or, if both parties can agree on a representative sample or samples of the forage, the same may be sent to any Federal hay inspector, either Army or civilian, for grading, and if either party is dissatisfied with such grading, an appeal may be taken to the Department of Agriculture.

(d) *Reinspection at destination.*—All hay or straw inspected at point of origin will be reinspected at destination for condition, and if found to be heating, wet, moldy, or musty, will be rejected, and the contractor promptly notified.

17. In order to provide for uniformity in the inspection of hay and to carry out the regulations as promulgated with respect thereto Federal hay inspectors were licensed by the Department of Agriculture, who inspected hay at the request of an owner of or dealer in hay, or served as inspectors at Army posts or Government establishments. The hay inspectors at Army posts were usually Army officers. When plaintiffs' hay in question was delivered, the hay inspector at Fort Sam Houston had taken the prescribed training course required by the Department of Agriculture to secure a license and had been duly licensed as a Federal hay inspector.

In addition to the Federal hay inspectors the Department of Agriculture had in its employ Federal hay supervisors whose duty it was to supervise the inspections as made by the Federal hay inspectors. The supervisors had no control over the inspectors except to the extent that a supervisor could review an inspection made by an inspector and reverse it when found clearly erroneous. Appeals could be made by a contractor to the supervisor when the contractor was dissatisfied with the rating as given by the inspector. Reversal could and would be made only when there was obvious error in the inspector's rating.

In most instances the civilian Federal hay inspectors were not employed by the Department of Agriculture, but were

licensed by that Department. They were paid by the particular party who engaged them to make an inspection. Inspections were requested by contractors at the point of origin of the hay in order to avoid expense incident to possible rejection of hay at point of delivery and in order that hay of an inferior grade might not be submitted on a contract.

Where a complete inspection was made of hay by a civilian Federal hay inspector prior to its delivery to an Army post under a contract, the Army regulations provided for its acceptance at the grade fixed by the civilian hay inspector unless there was obvious error in such prior grading. A provision to that effect was made a part of plaintiffs' contract. In other words, there was a reinspection of the hay upon delivery at the Army post, but the prior grade could not be changed unless there was some clear and outstanding error; that is, something more than a minor difference of opinion as to the factors which determined the grade in a given case. Rejection could also be made at destination where the hay was heating, or was wet, moldy, or musty.

18. For many years prior to the execution of the contract in question plaintiffs and other contractors had been furnishing to the defendant hay of the character called for in this contract and they were familiar with the kind and grades of hay as to color and quantity of foreign material that had customarily been accepted or rejected under the rules and regulations in force when the contract in suit was made. The hay furnished by plaintiffs usually came from South Texas. While that section does not produce the highest grade of hay, a small part of it being classified as Grade No. 1, plaintiffs had been filling their contracts with hay of that character which had been accepted by the Government as No. 2 Upland Prairie Feeding Hay with a relatively small number of rejections, averaging about 12%. About October or November 1929 the Federal Hay Supervising Inspector for the territory in which plaintiffs were located was criticized by someone in the War Department on account of the character of hay which was being accepted. As a result, inspections were made much more rigid than had theretofore been the case, and thereafter rejections in most cases ran much higher. A record of the acceptance and rejection

of all Upland Prairie hay delivered at Fort Sam Houston, Texas, shows the following percentage of rejections:

Year	Accepted	Rejected	Percent
1926	2,710,200	202,160	6.90
1927	10,659,724	1,457,480	12.02
1928	10,631,975	1,932,364	15.30
1929	7,032,730	781,160	9.90
1930	9,625,739	1,595,160	14.22

19. Plaintiffs began deliveries under the contract in question in October 1929, and that month 978 tons of hay were tendered of which 847 tons were accepted and 131 tons rejected as not meeting the specifications. In November 1929, 132 tons were tendered of which 121 tons were accepted and 11 tons rejected as not meeting the specifications. In December 1929, 277 tons were tendered of which 265 tons were accepted and 12 tons were rejected as not meeting the specifications. In January 1930, 203 tons were tendered of which 125 tons were accepted and 78 tons were rejected as not meeting the specifications. In February 1930, 3 tons were delivered, all of which were accepted.

20. December 6 and 11, 1929, respectively, the following correspondence took place between plaintiffs and the Quartermaster General:

QUARTERMASTER GENERAL,
Washington, D. C.

DEAR SIR: We would like to get an opinion from you as to the meaning of certain items contained in your circular No. 2 dated January 10, 1928. The first one is item No. 2 which refers to hay and straw inspecting. We would like to know the meaning of the word "obvious." We take this item No. 2 to mean that when a car is covered by a complete inspection certificate signed by a licensed Federal Inspector same will be accepted at destination by the Army as final unless there is such a difference in the grade that beyond a doubt the hay does not grade No. 2. We have had Army inspectors to reject hay covered by a complete inspection certificate when in their opinion it was only a few points off in color; outside of this they claim the hay would grade No. 2.

As you know the question of color is a matter that anyone could be mistaken in, at least, on a few points.

Where there is no color machine available to determine the actual color, the inspector has no way to determine the exact percentage of color. Surely this would not be considered an obvious error.

We also wish to call your attention to the last item in this circular letter—item D. It reads "reinspection at destination." We have construed this item to mean that hay covered by a complete inspection certificate signed by a licensed Federal Hay Inspector would be reinspected at destination only to determine whether or not the hay was sound and in sanitary condition. If same is found to be musty, moldy, heating, or wet it would be rejected. If same was found to be sound same would be accepted under the complete inspection certificate. We would appreciate your opinion on these items.

Yours truly,

MUELLER-HUBER GRAIN CO.

MUELLER-HUBER GRAIN CO.,
212 Burleson Street, San Antonio, Texas.

GENTLEMEN: Your letter of December 6, 1929, in which you request the meaning of the words "obvious error" in O. G. M. G. circular letter No. 2, 1928, has been received. Your interpretation of the paragraph in circular letter No. 2 wherein these words occur agrees entirely with that of this office. There was no intention, of course, that minor differences in quality should be regarded as constituting an obvious error in inspection. However, so much confusion has been occasioned by this expression that this office now has under consideration a revision of the regulations governing the inspection of forage, which will eliminate this questionable phrase.

Regarding the last paragraph in circular letter No. 2 covering reinspection at destination, this paragraph was intended to insure reinspection for condition but was not intended to supersede the reinspection provided for in paragraph No. 2a. In other words its purpose was to insure an inspection for condition regardless of the grading. This paragraph will also be cleared up in the contemplated revision of the inspection regulations.

For the Quartermaster General:

Very truly yours,

HIRAM E. TUTTLE,
Captain Q. M. Corps, Assistant.

21. January 9, 1930, the plaintiffs telegraphed the officer in charge of the Hay, Feed, and Seed Division, Bureau of Agricultural Economics, Department of Agriculture, complaining that the inspector at Fort Sam Houston was very technical and grading hay too closely; that his inspection would result in the substitution of Oklahoma for Texas hay; and that if common sense were used in grading plaintiffs' hay 90% would be accepted as No. 2 hay.

22. January 27, 1930, the division and post quartermaster at Fort Sam Houston, by purchase order No. *6748*, copy of which is filed as Exhibit No. 13 and made part hereof, purchased against plaintiffs' contract *6224*, 145.435 tons of feeding hay at $17.50 per ton.

23. January 29, 1930, the Quartermaster supply officer at Fort Sam Houston wrote plaintiffs as follows:

> This office has this date been advised that Mr. C. M. Funk, Hay Supervising Inspector, has sustained the rejection of hay, feeding, shipped the Division and Post Quartermaster, Ft. Sam Houston, Texas, in cars:
>
> MP 47153
> TNO 33308
> TNO 11887
> MP 14527
> TNO 50934
> TNO 11270
>
> These shipments were made to apply on contract No. *W 503 qm–6224*. It is requested that the carrier be advised of disposition and that immediate action be taken to replace shipments with hay of the grade covered by contract.

The six cars referred to in the letter of January 29, 1930, contained the 78 tons rejected in January. The six cars were tendered on January 24, 1930, and were covered by complete inspection certificate of the United States Department of Agriculture certifying the hay to be U. S. No. 2 Upland Prairie. After rejection, because of color, these six cars were rebilled to Fort Clark, Texas, where they were graded and accepted as U. S. No. 2 Upland Prairie Hay by the Army inspector there.

The reason given for the rejection by Army inspectors of plaintiffs' hay was that it did not conform to the color requirement, that is 35 percent green color. At that time no machines were in use at Fort Sam Houston for testing as to color; the determination was made by an inspection upon physical examination. As a result even well-trained inspectors could have an honest difference of opinion as to the exact percent of green color in a given quantity of hay, and a difference of as much as 5 percent would not be considered obvious error within the meaning of the hay-inspection regulations.

From the beginning of the rejections by Army inspectors of the hay under their contract and throughout the period when they were attempting to make deliveries, plaintiffs made various appeals from, and protests against, such rejections. Such appeals and protests were made to the inspector at the Army post who rejected the hay, the defendant's contracting officer, the quartermaster supply officer at Fort Sam Houston, and to the Secretary of War. In addition protests were made to the appropriate bureau in the Department of Agriculture which was charged with the function of preparing the various requirements for the different grades of hay and licensing inspectors who made the inspections.

Plaintiffs made no request of the supervisor of Federal hay inspectors for reinspection of the various cars which were rejected, for the reason that in most, if not all, instances such supervisor was present when the rejection was made, and it was useless to ask for a reinspection. In many instances the Army inspector rejected hay theretofore duly inspected and accepted, when there was no obvious error in the inspection and acceptance thereof by the Federal Hay Inspectors.

24. On February 5, 1930, the division and post quartermaster at Fort Sam Houston, by purchase order No. *6845*, copy of which is filed as Exhibit No. 14 and made part hereof, purchased against plaintiffs' contract *6224* 93.19 tons of feeding hay at $17.50 per ton.

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25. On February 12, 1930, the plaintiffs wrote Brigadier General William Lassiter, Commander of the Eighth Corps Area, Fort Sam Houston, as follows:

We have just received a telegram from Congressman Harry M. Wurzbach, a copy of which is attached, advising that the Quartermaster General is taking up with the Commander of the Eighth Corps Area the matter of hay inspection in the Eighth Corps Area.

We are enclosing a complete file of the correspondence covering the entire hay controversy which started some sixty days ago. We are also enclosing a letter from Herman A. Nester, who is the chemist for the San Antonio laboratories. Mr. Nester made the chemical analysis of two kinds of hay for us and the letter is self-explanatory. We are also sending you under separate cover a sample of each of the two kinds of hay which Mr. Nester analyzed. Sample No. 1 is South Texas Prairie Hay carrying 20% to 25% green color and sample No. 2 is No. 1 Oklahoma Hay carrying 55% green color. We are also enclosing a copy of a telegram received from Mr. Wheeler of the hay feed and seed Division of the Department of Agriculture dated February 4th giving us the percentage of green measured in four samples of hay which we mailed to the Department of Agriculture out of four cars rejected at Fort Sam Houston. You will notice the color ranges from 27% to 46% green. Two of the samples contained no weeds at all. We are allowed 15% foreign material, which would be weeds, in No. 2 Hay.

From the correspondence you will notice that our contention is that the inspectors grading this hay are trained to grade hay according to the color machine at Washington and you will also notice from the correspondence that Mr. Wheeler stated that the color machine which they were now using was not one hundred percent accurate and that they had ordered a new machine which would be used in the future.

If the hay which we offered to deliver the Quartermaster at Fort Sam Houston were properly graded and the Inspector in order to determine the green contained in the hay would take one pound of hay and assort the green and the brown blades and the weeds weighing separately each separation, he would find that all of this hay that he has been refusing on the contractors would carry from 40% to 45% green color. Mr. Wheeler stated to us that the Department of Agri-

culture would make the necessary corrections in the Specifications covering South Texas Prairie Hay so that the specifications would fit the hay. When this is done there will be no further trouble in making deliveries of South Texas Prairie Hay on Army contracts.

Mr. Wheeler also stated that hay in different localities required different specifications. The green color in the Oklahoma hay is a higher green than the green found in South Texas Prairie Hay and for that reason when measured on the color machine at Washington we are not given credit for the actual amount of green color found in our hay.

The nitrogen-free extract found in our hay is 45% greater than is found in the Oklahoma Hay which increased the palatability of the hay, and in addition to the 45% more nitrogen-free extract, we have approximately 45% less fiber in our hay than the Oklahoma Hay, and fiber, as you know, is undigestible and contains no feed value whatsoever. The calories contained in our hay are 22% greater than are found in the Oklahoma Hay. All of this is undisputed by the Department of Agriculture and in fact Mr. Wheeler admitted that the Department had never made any chemical or other tests to determine which of the hays contained the most feed value.

We would appreciate if you would please give us a hearing in order that we may personally present the facts in connection with this controversy before you make your decision and report on this matter.

26. February 19, 1930, the chief of the Bureau of Agricultural Economics, Department of Agriculture, wrote the following letter to the plaintiffs:

Your letter of the 10th to the Secretary of Agriculture in further reference to the grading of South Texas Prairie hay has been referred to me for reply. I note your criticism of the handling of samples sent in to Mr. Seeds, of this Department, for determination of color. You state that Mr. Seeds withheld information relative to these samples and passed the same on to Mr. Wheeler.

I have looked into this matter and find that not only does there seem to be no possibility of criticism of Mr. Seeds in the handling of it but rather that it was handled very expeditiously and through the appropriate channels. You will recognize that in both official and business institutions there are regular and proper ways

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of handling such matters and that it is not possible to comply with requests contrary to such policies, particularly when such requests are of the character of the one made by you the compliance with which would require an employee of a division to deliberately withhold information from the chief of such division on a matter that was being handled by him. Any person in this bureau who knowingly had done this would be subject to censure.

In this particular case Mr. Wheeler had specifically instructed the men in his division in Washington to keep him informed of all matters pertaining to the Texas hay situation. I find that the samples referred to were received on February 3. They were run for color immediately and as Mr. Wheeler was then in the vicinity of Houston, Texas, Mr. Seeds wired reply to him for delivery to you assuming that inasmuch as you were concerned with the matter which Mr. Wheeler was handling that he would be able to deliver the message to you promptly. Upon receipt of a wire the following morning stating that because of adverse weather conditions Mr. Wheeler and the other members of his party had gone to San Antonio the night before, Mr. Seeds repeated the message over our leased wire to San Antonio. Mr. Wheeler received this wire just as he was opening the conference at San Antonio, at which you were present. As he opened the message he noted that a part of it was for you and read that portion of the wire immediately to you and furnished you a typewritten copy of it as soon as one could be prepared.

We were not aware that any charges had been made as to the integrity of any member of the Hay, Feed, and Seed Division that appear to have prompted your request for confidential handling of such information, but rather that the investigation was to cover the quality of hay being delivered under Army contracts and the efficiency of the inspectors that were grading hay for delivery. If we are incorrect in this and a matter of integrity is involved, please furnish us with information which warrants any question of the integrity of the individuals involved.

In this letter we can do little more than to repeat in substance the same kinds of statements that we have made before covering this matter which summarized are as follows:

1. Color is accepted as one of the most important, if not the most important, indicator of value of hay in U. S. standards except with legume hays where leafiness

takes precedence over color. Until there is some definite evidence to the contrary and a better measure of value found, this will remain as the most important factor.

2. Chemical analyses, though of value in determining the constituents of hay, are far from being a definite indicator of feed value and when considered the conclusions should be based upon the results of many tests of samples obtained under varying conditions and upon a careful study of the facts revealed by such analyses.

3. Until the U. S. standards became effective there was no accurate measure or yard stick by which to grade hay or to determine the relative value of hay of various classes and grades.

4. As a result of investigations in the development of U. S. standards for hay, a machine was developed which made possible an accurate determination of the color of hay without having to depend upon varying judgments of different persons under varying conditions. This machine does not possess any occult power to put color into or take color from hay but simply gives a uniform measure or determination of color which is impossible with the unaided human eye. The same type of machine is also used by this department for measuring color in the standardization of cotton and other commodities.

5. It is not claimed that any inspector can determine the absolute color of hay by eye alone down to a few percent variation of color. Taking the average of inspectors we have accepted 5% variation in color estimation without criticizing the inspector on efficiency. This does not mean necessarily that with a limit of 35% green color as the bottom of No. 2 that inspectors can estimate hay as 30% green and grade it No. 2 for if he were to do so he would immediately be lowering the limit of No. 2 five points and in this case possibly grading hay that was only 25% green as No. 2. Thirty-five percent green color is the absolute bottom limit for No. 2, but because of the slight variation in the ability of different persons to determine color accurately it may be that hay which would measure 30 or 32% might be estimated by the inspector to be 35% green and if it was otherwise good in every respect, call it No. 2. Thirty-five percent must not be considered the average of No. 2 but rather the bottom and anyone purchasing No. 2 hay should get hay in which this is the bottom of quality as to color rather than hay in which this is a top line covering hay ranging from 25 or 30 to 35%. The latter hay would and should be graded as No. 3 on color in every instance.

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6. With reference to the obvious error, the question was put to Mr. Wheeler when in San Antonio as to whether 10 points off in color would be an obvious error for an inspector to make. He stated that it would. This does not mean that the sample would have to be off fully 10 points in color to be an obvious error.

7. You have given the color run on the 4 samples of hay that you sent to Washington for determination of color, the average of which is approximately 34%. The average of 17 samples previously picked at random from the same group of cars and sent to Kansas City and Washington for determination of color ran approximately 23%. We do not know how the samples you sent were selected but we think probably that neither of these lots of samples represents the average of color for the entire group of cars for there was no effort made in either case so far as we know to pick all of the samples with an idea of arriving at an accurate average of the lot but simply to determine the types of hay that occurred in the lots in question. As a matter of fact it is not average qualities that determine the grade of carlots of hay when there is a great range of qualities in the cars. Averages can only be used in the grading of hay within very narrow limits. Carlots of hay with a great range of colors or otherwise showing a wide range of qualities would have to be graded in a way to show so far as possible the percentages of the various grades in the car, if several grades were present.

We believe that with a supervisor stationed at San Antonio, as we have now, that in a reasonably short space of time considerable improvement can be made in the quality of hay delivered under Army contracts. There has been room in the past for a great improvement in such deliveries and we believe that progress is being made.

We have no intention of abolishing the San Antonio office at the present time but have in mind making it as efficient as possible not only in properly supervising the grading of hay but in trying to bring about conditions which will make it possible to put on the market a better grade of hay in the future.

27. As a result of the more rigid requirements it became more difficult for plaintiffs to secure hay to be delivered under the contract. There was plenty of South Texas hay available which theretofore had been accepted as satisfying the specification for No. 2 hay, but when it was rejected

plaintiffs discontinued using it for delivery under their contract and furnished more expensive Oklahoma hay instead.

May 8, 1930, Amos K. Bass, wholesale hay and grain dealer of Durant, Oklahoma, wrote plaintiffs as follows:

> Referring to the hay sold you for the government, will say that three-fourths of this hay that I shipped was, in my judgment, No. 1 hay and I was selling it all over the country as No. 1 hay.
>
> I shipped you some of what I thought was No. 2 hay, and the government refused it, calling it No. 3. I diverted some of this hay on some orders I had and it went through without a word.
>
> Of course I could sell you some more hay, but I would have to figure on shipping No. 1 hay, and would have to sell you this hay on the basis of No. 1 hay.
>
> I have some of what I call No. 2 hay, but it is just like I told you, I would not ship it and guarantee it to stand up. However, you have the sample and if you want to take the chance, I would be glad to ship you some. Otherwise I could not.

28. February 25, 1930, the quartermaster supply officer at Fort Sam Houston wrote plaintiffs as follows:

> Your attention is called to letter of this office of Feb. 3d, 1930, transmitting you copy of purchase order No. *W–503 qm–6748*, covering the purchase of 145.435 tons hay, feeding, from the J. W. Stewart Co., Chelsea, Oklahoma, for delivery to the Division and Post Quartermaster, Ft. Sam Houston, Texas, to apply against your delinquency under contract No. *W–503 qm–6224*. In this communication you were informed that the Government had incurred a loss of $669.00 in making this purchase. Since writing communication delivery has been completed, and it is found that the excess cost that is to be charged to you is $662.45 instead of $669.00. It is requested that you remit this office by return mail your check in the sum of $662.45, or that authority be granted to have the Finance Officer, U. S. Army, Ft. Sam Houston, Texas, deduct this sum from any monies now due, or may become due your firm. This sum is in addition to $428.67 excess cost incurred on P. O. *W 503 qm–6845*.

29. March 8, 1930, the plaintiffs wrote the following letter to the quartermaster supply officer at Fort Sam Houston:

> With reference to our contract at Fort Sam Houston for furnishing No. 2 Upland Prairie Hay and on

which we were delinquent some 245 tons on account of the veterinary Inspector refusing to accept hay which we tendered on this contract. We have always contended that the hay which we tendered the Government on this contract graded U. S. No. 2 Upland Prairie and should have been accepted and applied on our contract. The last six cars which we tendered the Quartermaster at Fort Sam Houston were covered by complete Federal inspection certificates grading U. S. No. 2 Upland Prairie Hay. We made several attempts to deliver U. S. No. 2 Upland Prairie from Texas, but same was rejected by the veterinary Inspector at Fort Sam Houston.

We hereby protest the charging of any loss to our account sustained by the Government on account of purchasing Oklahoma Hay against our contract. We had sufficient No. 2 Upland Prairie Hay to complete our contract, but the veterinary Inspector at Fort Sam Houston rejected all Texas Prairie Hay tendered by us since January 13th. This has caused us a very heavy loss and the Government should reimburse us for our loss.

Our contract provides, where complete inspection certificates are furnished, same will be accepted as final unless an obvious error has been made. The veterinary Inspector at Fort Sam Houston rejected six cars of hay on which we were compelled to pay something like $35.00 demurrage on each car, and in addition to this the same hay was shipped to another post where a licensed Federal Inspector, who is licensed by the Department of Agriculture, graded this hay U. S. No. 2 Upland Prairie Hay and applied same on our contract.

We regret very much that we find it necessary to file this protest, as we know the Quartermaster Supply Officer is not responsible for the rejection of this hay. The Quartermaster Supply Officer is the purchasing officer for the Government and has nothing to do with the grading of hay. We also know that the Quartermaster Supply Officer was compelled to purchase hay in the open market, as the supply of forage at Fort Sam Houston had become completely exhausted.

In order to protect our claim it becomes necessary for us to file this protest. We have this matter up with the Quartermaster General and Secretary of the War Department, and just as soon as we receive a reply from the Quartermaster General or the Secretary of the War Department we will advise you just what action we will take in this matter.

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30. August 11, 1930, the quartermaster supply officer wrote the plaintiffs as follows:

> With reference to correspondence had with you relative to the excess cost of $662.45 incurred in purchasing hay from the J. W. Stewart Co., Chelsea, Oklahoma, under purchase order No. *W 503 qm–6748*, and $428.67 incurred in purchasing an additional quantity of hay from the same contractor under purchase order No. *W 503 qm–6845*, due to your delinquency in effecting delivery of hay, feeding, under contract No. *W 503 qm–6224*, you are informed that this office has been instructed by the Quartermaster General, Washington, D. C., to have the Finance Officer, U. S. Army, Ft. Sam Houston, Texas, withhold from payments due you the sum of $1,091.12 to cover the excess costs on purchases mentioned. The Finance Officer, U. S. Army, Ft. Sam Houston, Texas, has been instructed accordingly.

Through their attorney, plaintiffs protested the withholding of this amount to the Quartermaster General on October 25, 1930, and submitted thereto claim for damages with respect to the contracts embraced in this suit. The claim was forwarded to the General Accounting Office and was disallowed by the Comptroller General July 30, 1931.

No part of the $1,091.12 has been paid by defendant to the plaintiffs.

31. Plaintiffs waive, cancel, and abandon all claims based upon loss of profits on undelivered hay, and damages for hay delivered and rejected.

The court decided the plaintiffs were entitled to recover from the United States $1,181.72, and that the defendant was entitled to recover from the plaintiffs on its counterclaim $234.43, which was heretofore offset by the Comptroller General from amounts otherwise due the plaintiffs.

LITTLETON, *Judge*, delivered the opinion of the court:

The total of $1,416.15 sought to be recovered in this case resulted from the purchase of hay by the contracting officer of the defendant at prices in excess of the prices stated in plaintiffs' contracts which he charged against plaintiffs under three contracts, Nos. 6218, 6961, and 6224, as set forth in the findings.

Contract 6218 of September 17, 1929, called for the delivery by plaintiffs at Ft. Clark, Texas, of 1,285 tons of feeding hay, delivery "to commence October 1, 1929, and be completed at a rate not exceeding 15 tons per working day," and 458 tons of bedding hay or straw, to be delivered in the same way.

On March 25, 1930, five months after delivery under contract 6218 was required to be commenced, the property officer at Ft. Clark wrote plaintiffs that on that date there was due 102.3 tons of feeding hay under this contract and 266.22 tons of bedding hay. The contracting officer at Ft. Sam Houston had previously written plaintiffs on November 14 and December 18, 1929, asking for deliveries under this contract (finding 3). The evidence is not sufficient to show that when the letter of March 25, 1930, above mentioned, was written at Ft. Clark calling upon plaintiffs to deliver the balance of the hay due under contract 6218 a sufficient quantity of hay had been delivered and was on hand at Ft. Clark to supply the needs of the defendant at that post. Between the date of this letter and April 4, 1930, plaintiffs delivered certain feeding hay but did not make any deliveries on the balance of the bedding hay called for by the contract. Accordingly, on April 4, the contracting officer purchased against this contract the balance of the feeding hay due on that date of 10.565 tons and the balance of 262 tons of bedding hay called for at a total price of $234.43 in excess of the price a ton, at which plaintiffs had agreed to deliver the hay, and charged that amount against plaintiffs.

Plaintiffs claim that inasmuch as the contract did not specify a definite period within which delivery should be made, but only that delivery should commence on October 1, 1929, and be completed at a rate not to exceed 15 tons a day, there was no delinquency under the contract, either on March 25, 1930, or April 4, 1930, when the purchases were made against their account. This contention cannot be sustained upon the facts. Under the terms of the contract, the plaintiffs were required to make delivery of the number of tons of hay called for within a reasonable time, or as needed by the Government, not to exceed 15 tons a day.

Six months was a reasonable time for compliance with the contract and the letters written by the defendant to plaintiffs asking for delivery of the hay under this contract are sufficient to show that the defendant needed the hay and desired that it be delivered. The contracting officer was therefore justified in the circumstances in declaring plaintiffs in default under this contract and in purchasing the balance of the hay due under the contract and charging the excess cost thereof to plaintiffs' account.

The next contract involved is No. 6961, calling for the delivery of 402 tons of feeding hay. In the first part of this contract relating to the number of tons purchased it was provided that 140 tons were to be delivered during March 1930 at a rate not to exceed 15 tons a day beginning March 15, to be completed by March 31, 1930, and that 262 tons were to be delivered during April 1930, at a rate not to exceed 15 tons a day, beginning April 1, and to be completed by April 30, 1930. On Sheet 2 of this contract under the provisions relating specifically to the matter of delivery of the hay called for, the contract provided that 140 tons, of the 402 tons called for, should be delivered during March—delivery to commence March 15, 1930. This delivery schedule further specifically provided that the balance of 262 tons was to be delivered during April and May 1930 at a rate not to exceed 15 tons a day, effective April 1 and May 1, 1930. In the letter from the contracting officer accepting the bid of plaintiffs, the contracting officer advised plaintiffs that in case of delinquency in delivery of the hay existing over a period of ten days, if not satisfactorily explained, the defendant would make purchases against their account in accordance with instructions accompanying the advertisement for bids. This contract No. 6961 was not executed by the defendant until March 27, 1930. Plaintiffs delivered and defendant accepted 273 tons of hay under this contract prior to April 4, 1930. On that date the contracting officer arbitrarily declared the plaintiffs in default and purchased the remaining hay called for by the contract of about 129 tons at $90.60 in excess of the contract price for this quantity and charged that amount to plaintiffs' account and deducted the same from an amount otherwise due plaintiffs under an-

other contract. It is clear from the record that by this action the defendant breached the contract and that plaintiffs are entitled to recover the excess cost of $90.60 so charged to them. Under the terms of the contract relating specifically to delivery, plaintiffs could not be held delinquent until after May 1930. Moreover, the contract did not become effective until it was executed by the defendant on March 27, 1930, and that date operated also to extend the contract time for performance by the number of days between March 18, when the contract was forwarded to plaintiffs, and March 27, when it was executed by the defendant. *George Griffiths, Trading as George Griffiths Construction Co.*, v. *United States*, 77 C. Cls. 542, 552.

The next contract is No. 6224 under which the defendant made certain purchases of hay in the open market against plaintiffs' account at a cost of $4.60 a ton in excess of the contract price and charged plaintiffs with $1,091.12, which they allege was improper and erroneous, and for which they ask judgment. Under the facts disclosed and under the authority of the decision of this court in *Thomas C. Edwards* v. *United States*, 80 C. Cls. 118, the defendant, rather than plaintiffs, breached this contract by rejecting hay which complied with the provisions of the contract and Department of Agriculture specifications, and the purchases made against plaintiffs' account by reason of that action were improper and unauthorized. Plaintiffs are therefore entitled to recover the amount of $1,091.12 charged against them under this contract. The record shows that hay tendered by plaintiffs under this contract was rejected by the Army hay inspector when such hay had been regularly and properly accepted by a licensed federal hay inspector under Department of Agriculture specifications, which rejected hay was found, upon analysis, to comply with defendant's specifications. In addition the Army inspector rejected a number of cars of hay tendered which had been duly inspected and certified by a federal licensed hay inspector, and this hay was reshipped by plaintiffs to the defendant at another Army post under a similar contract and was accepted.

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Plaintiffs are entitled to recover $1,181.72 and the defendant is entitled to recover on its counterclaim $234.43, which was heretofore offset by the Comptroller General from amounts otherwise due plaintiffs. Judgment will therefore be entered in favor of plaintiffs for $1,181.72. It is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

STATEN ISLAND SHIPBUILDING COMPANY v. THE UNITED STATES

[No. 42824. Decided February 5, 1940]

On the Proofs

Income tax; claim for refund; statute of limitations.—Where taxpayer filed a claim for refund on the ground that a portion of overpayments for 1918 and 1919 had been applied toward the satisfaction of 1920 assessment after the statutory period had expired, it is held that since taxpayer on July 10, 1921, filed a claim for abatement of more than the amount of the unpaid assessment for 1920 and this claim for abatement was not rejected until October 6, 1928, stopping the running of the statute, the credit of the 1918 and 1919 overassessments against this 1920 assessment on October 8, 1928, was within the statutory period.

Same; credit of overassessments.—Where, at the time a portion of the 1918 and 1919 overassessments was credited against the 1920 tax liability, there was an outstanding assessment of taxes for that year in the amount of the credits, it cannot be said there was no tax due from taxpayer for the year 1920 so as to preclude such credits.

Same; appeal to Board of Tax Appeals; jurisdiction.—Where plaintiff took an appeal to the Board of Tax Appeals from the Commissioner's action proposing a deficiency in 1920 taxes, and in such proceedings the taxpayer had the right to show that it had overpaid its taxes as claimed in the instant suit, it is held that under Section 284 (d) of the Revenue Act of 1926 the court is without jurisdiction.

The Reporter's statement of the case:

Mr. James Gillin for the plaintiff. *Mr. Henry W. Baird* was on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact, as follows:

1. Plaintiff, a corporation organized under the laws of the State of New York, was engaged during the years 1918, 1919, and 1920 in the construction of ships for the United States Shipping Board Emergency Fleet Corporation. Pursuant to a ruling of the Labor Adjustment Board it paid a certain amount during the years 1918 and 1919 in increased wages to its employees engaged in such work. In 1920 the United States Shipping Board Emergency Fleet Corporation refunded to it on this account the sum of $299,722.79.

2. In its income-tax return for 1920 the plaintiff included this amount in its gross income. The tax shown to be due in said return was $63,877.62, which amount was assessed against it by the Commissioner on October 10, 1921. On March 16, 1921, and June 15, 1921, the plaintiff made payments of $15,970.00 each on account of this assessment, but on July 10, 1921, it filed a claim for abatement in the amount of $53,009.62, and made no further payments on account thereof.

3. On July 24, 1922, the Commissioner of Internal Revenue wrote plaintiff a letter stating in part that an audit of its returns indicated an additional income-tax liability of $121,-818.94 for 1918, an overassessment of $39,760.19 for 1919, and of $54,662.68 for 1920. In this letter the Commissioner took the position that the Shipping Board wage reimbursement, referred to above, should have been included in 1918 and 1919 income instead of 1920 income.

4. No final action, however, was taken by the Commissioner with respect to any of these years until July 31, 1928, when the Commissioner wrote the plaintiff stating that the determination of its tax liability for the year 1920 disclosed that the total income and excess profits tax due for the year 1920 was $101,589.30, leaving a deficiency of $37,711.68, after

deduction of the tax previously assessed of $63,877.62. In this letter the Commissioner took the position that the Shipping Board wage reimbursement was 1920 income, but should be taxed at 1918 rates.

In this letter plaintiff was notified of its right to appeal to the United States Board of Tax Appeals.

5. Plaintiff duly took such an appeal, alleging that there was no deficiency in tax, but that, on the contrary, it had overpaid its tax for that year in the amount of $63,877.62, and that this amount should be refunded to it. Subsequently, the parties entered into a stipulation agreeing "that there is no deficiency in Federal income tax due from, or overpayment due to, this petitioner for the taxable year 1920." Upon the basis of this stipulation the Board entered an order on February 15, 1934, ordering and deciding "that there is no deficiency or overpayment for the year 1920."

6. In the meantime, the Commissioner on October 6, 1928, had rejected plaintiff's claim for abatement of 1920 taxes, and on October 8, 1928, the Commissioner had issued certificates of overassessment for the years 1918 and 1919 certifying that there had been an overassessment for 1918 in the amount of $50,093.85, and an overassessment for 1919 in the amount of $116,294.56.

$15,575.52 of the overassessment for 1918 and $16,362.10 of the overassessment for 1919 was credited to the unpaid balance of the 1920 assessment.

7. On February 7, 1930, plaintiff filed a claim for refund of $31,937.62, on the ground that the said portion of the 1918 and 1919 overassessments had been credited against the 1920 assessment after the statutory period for the collection of that assessment had expired.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

As stated in the findings of fact, the claim for refund, forming the basis of this suit, was on the ground that a portion of the 1918 and 1919 overpayments had been applied toward the satisfaction of the 1920 assessment after the statutory period for the collection of the 1920 tax had expired. This suit is

predicated on the proposition that at the time a portion of the 1918 and 1919 overassessments was credited against the 1920 assessment there was no tax due from the plaintiff for the year 1920. It seems manifest that neither of the two propositions is well taken.

On July 10, 1921, plaintiff filed a claim for abatement of more than the amount of the unpaid assessment for 1920, which claim for abatement was not rejected until October 6, 1928. [This stopped the running of the statute. Section 611 of the Revenue Act of 1928 (45 Stat. 791, 875).] The credit of the 1918 and 1919 overassessments against this 1920 assessment was made two days later and, therefore, within the statutory period.

At the time a portion of the 1918 and 1919 overassessments was credited against the 1920 tax liability, there was an outstanding assessment of taxes for that year in the amount of the credits. It cannot, therefore, be said that there was then no tax due from the plaintiff for the year 1920.

The plaintiff made its return for 1920 treating the amount received from the United States Shipping Board Emergency Fleet Corporation as 1920 income. Upon this basis the assessment of $63,877.62 for this year was made. The Commissioner's letter of July 24, 1922, treated this payment as 1918 and 1919 income, and it was upon this assumption that he stated that an audit of their returns indicated an overassessment for 1920. Later, in July 1928, he finally came to the conclusion that this was not 1918 and 1919 income but 1920 income, but that it should be taxed, not at 1920 rates, as the taxpayer had done in its return, but at 1918 rates. For this reason he asserted a deficiency against the taxpayer, from which action the taxpayer took an appeal to the Board of Tax Appeals.

After this case had been pending there sometime the parties entered into a stipulation that there was no deficiency due the Government for this year and that there was no overpayment due the taxpayer. An order was entered by the Board accordingly. This was an agreement on the part of the Commissioner that this refund from the Shipping Board should not be taxed at 1918 rates, and an agreement on the part of the plaintiff that it was 1920 income, as it had

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treated it in its return, upon the basis of which the assessment was made. If it was 1920 income, then there was a tax due in fact from the plaintiff for the year 1920 at the time the credits were made, because the plaintiff had only paid $31,937.62 on an assessment of $63,877.62, which assessment was based upon the inclusion of this refund from the Shipping Board in 1920 income.

Furthermore, plaintiff took an appeal to the Board of Tax Appeals from the Commissioner's action proposing a deficiency in 1920 taxes. In the proceedings before the Board the taxpayer had the right to show that it had overpaid its taxes as it claims in this suit. This court, therefore, has no jurisdiction of this suit under the provisions of section 284 (d) of the Revenue Act of 1926 (44 Stat. 9, 67), which provides:

> If the Commissioner has mailed to the taxpayer a notice of deficiency under subdivision (a) of section 274, and if the taxpayer after the enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed in such subdivision, no * * * suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court, * * *.

It results that plaintiff's petition must be dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WESTERN FRUIT EXPRESS COMPANY v. THE UNITED STATES

[No. 43270. Decided February 5, 1940]

On the Proofs

Capital-stock tax; amended return within extended time.—Where plaintiff on August 22, 1933, filed a capital-stock tax return for the first capital-stock year ending June 30, 1933, and thereafter on September 28, 1933, filed another, amended return for the same year, and both returns were filed within the time allowed by statute as extended by the Commissioner of Internal Reve-

nue pursuant to authority conferred by statute, it is held that plaintiff was entitled under the statute to amend the declaration of value as made in the return filed August 22, 1933, within the time allowed for filing its capital-stock tax return for the "first year" ending June 30, 1933.

Same.—"First return" means a return for the first year in which the taxpayer exercises the privilege of fixing its capital-stock value for tax purposes and includes a timely amended return for that year.

The Reporter's statement of the case:

Mr. Thomas M. Wilkins for the plaintiff.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General James W. Morris* for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

Plaintiff brought this suit to recover $4,800 collected for the first capital stock tax year ending June 30, 1933, under section 215 of the National Industrial Recovery Act approved June 16, 1933.

The court made special findings of fact, as follows:

1. Plaintiff is a Delaware corporation doing business in the United States, with its principal office in Washington, D. C. It was organized July 18, 1923.

2. Under the provisions of section 215 of the National Industrial Recovery Act of June 16, 1933, plaintiff was required to file a capital stock tax return for the year ending June 30, 1933. Except for extensions subsequently granted, that return was due July 31, 1933. However, the Commissioner of Internal Revenue granted an extension of time for the filing of the return to August 30, 1933.

3. Prior to the expiration date as extended, plaintiff on August 22, 1933, mailed to the collector of internal revenue at Baltimore, Maryland, a capital stock tax return (Form 707) for the year ending June 30, 1933. That return showed a declared value of plaintiff's entire capital stock of $6,800,000 as of December 31, 1932, and a tax due of $6,800. Plaintiff paid that tax September 1, 1933, and no part thereof has been credited or refunded to plaintiff.

4. August 24, 1933, the Commissioner granted a further extension of time until September 29, 1933, for filing all Federal capital stock tax returns for the year ending June 30, 1933.

5. September 28, 1933, plaintiff executed and mailed to the collector of internal revenue at Baltimore, Maryland, another capital stock tax return for the year ending June 30, 1933, which it denominated "First Return." That return was received by the collector September 29, 1933, and showed a declared value for plaintiff's entire capital stock of $2,000,000 as of December 31, 1932, and a tax due of $2,000.

6. At all times during the calendar year 1933 plaintiff was a subsidiary corporation of the Great Northern Railroad Company, its entire capital stock being owned by that company. The railroad company and its subsidiaries, including plaintiff, were authorized to file, and did file, consolidated Federal income and excess profits tax returns for the calendar year 1933 in accordance with the provisions of section 141 of the Revenue Act of 1932. (47 Stat. 169.)

7. The consolidated group, consisting of the great Northern Railroad Company and its subsidiaries, including plaintiff, sustained a net loss for Federal income and excess profits tax purposes for the calendar year 1933 and filed a consolidated return reflecting that net loss. The net income of plaintiff for Federal income and excess profits tax purposes for the calendar year 1933, without reference to the consolidated returns provisions, was $650,172.78.

8. September 29, 1933, plaintiff filed a claim for the refund of $4,800 of the capital stock tax of $6,800 which had been paid by it September 1, 1933, on the ground that the return as filed by it on September 29, 1933, which was within the period for filing capital stock tax returns as extended, should be accepted as its first return in lieu of the return filed August 22, 1933. February 23, 1934, the Commissioner rejected that claim on the ground that the documents filed August 22, 1933, should be considered plaintiff's first return and therefore, under the statute, could not be amended to permit a different declared value for its capital stock.

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9. August 17, 1937, plaintiff filed a further claim for refund of the entire capital stock tax of $6,800 paid by it on September 1, 1933, for the year ending June 30, 1933, on the ground that section 215 of the National Industrial Recovery Act was unconstitutional. (48 Stat. 195.) October 18, 1937, the Commissioner notified the plaintiff by registered mail of his rejection of that claim.

10. The capital stock tax return of plaintiff as filed on August 22, 1933 (referred to in finding 3), was prepared by plaintiff's secretary, the officer charged with the duty of preparing that return. In its preparation that officer collaborated with plaintiff's comptroller in order to arrive at a fair estimate of plaintiff's net income for the calendar year 1933, and also consulted various attorneys as to the general practice in the preparation of a return of that character. On the basis of information that the general practice was to multiply the estimated income by eight in order to arrive at a declared value of capital stock which would result in no excess profits tax, plaintiff's secretary multiplied the estimated income of $850,000 by eight and thereby determined a declared value for plaintiff's capital stock of $6,800,000.

11. At the time the capital stock tax return was filed on August 22, 1933, plaintiff's secretary was unaware, nor did he take into consideration, that consolidated returns for Federal excess profits tax purposes would be permitted for 1933 under the National Industrial Recovery Act for the consolidated group of which plaintiff was a member. On or about September 16, 1933, through the issuance by the Treasury Department of T. D. 4390, plaintiff's secretary became aware that consolidated returns would be permitted for excess profits tax purposes under the National Industrial Recovery Act. When plaintiff's secretary became aware of that fact and since he was aware that a net loss was being shown for the group, which fact was likewise known to him on August 22, 1933, he proceeded to prepare the capital stock tax return referred to in finding 5, in which the declared value of plaintiff's entire capital stock was $2,000,000 instead of $6,800,000, as shown in the return filed August 22, 1933. While it was not necessary to show any declared

value in order to obviate the necessity for the payment of any excess profits tax for 1933, plaintiff's secretary used the declared value of $2,000,000 because of a provision in the statute which required the same value to be used for subsequent years and, since the same value was to be used in subsequent years, plaintiff's secretary considered that such amount might be beneficial to plaintiff in such years in the event sufficient profit was shown for the group to produce an excess profits tax liability. Neither the declared value of $2,000,000 nor the declared value of $6,800,000 was arrived at on the basis of any necessary relationship to the actual value of plaintiff's capital stock, both amounts being arbitrary in character and being set out in the returns because of the reasons heretofore stated.

The court decided that the plaintiff was entitled to recover.

OPINION PER CURIAM: On August 22, 1933, plaintiff filed a capital stock tax return for the first capital stock year ending June 30, 1933, and in this document a value of $6,800,000 for its capital stock at December 31, 1932, was shown. Thereafter, on September 28, 1933, plaintiff prepared, executed, and filed another return for the first capital stock tax year ending June 30, 1933, which it denominated its "First Return", in which it declared the value of its entire capital stock at $2,000,000 as at December 31, 1932. The time as extended for filing the capital stock tax return for the first year ending June 30, 1933, and for declaring a value for the capital stock, for the purpose of the capital stock and the excess profits tax, did not expire until September 29, 1933. Both documents above mentioned were filed within the time allowed by statute as extended by the Commissioner of Internal Revenue pursuant to authority conferred by statute.

A capital stock tax of $6,800 was collected on the basis of the value of $6,800,000 stated by plaintiff in the first document filed. The capital stock tax due based on the value declared in the second return, denominated by plaintiff as its "First Return" for the first capital stock tax year, was $2,000. Plaintiff duly filed a claim for refund

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for the difference of $4,800 which the Commissioner rejected on the ground that plaintiff was bound on the value of $6,-800,000 declared in the return filed August 22, 1933. Thereafter this suit was timely instituted.

Plaintiff was entitled under the statute to amend the declaration of value as made in the return filed August 22, 1933, within the time allowed for filing its capital stock tax return for the "First Year" ending June 30, 1933. In *Haggar Company* v. *Helvering*, 308 U. S. 389, decided January 2, 1940, the court said:

> "First return" thus means a return for the first year in which the taxpayer exercises the privilege of fixing its capital stock value for tax purposes, and includes a timely amended return for that year. A timely amended return is as much a "first return" for the purpose of fixing the capital stock value in contradistinction to returns for subsequent years, as is a single return filed by the taxpayer for the first tax year.

Plaintiff is entitled to recover and judgment will be entered in its favor for $4,800 with interest as provided by law. It is so ordered.

THE HANNA FURNACE CORPORATION v. THE UNITED STATES

[No. 43293. Decided February 5, 1940]

On the Proofs

Income tax; rejection of refund claim.—Where plaintiff, a corporation, on February 26, 1924, filed a general claim for refund of overpayment of income taxes for 1918, and the Commissioner on June 3, 1924, made a refund on a claim filed on June 24, 1921, even if plaintiff had the right to file a claim for refund on June 21, 1927, as an amendment to its general claim of February 26, 1924, the claim as thus amended was rejected by the Commissioner on September 17, 1927, when on that date the Commissioner wrote "your returns for these years are therefore considered closed," notwithstanding the Commissioner's failure to state specifically that the claim was "disallowed" and plaintiff could not in 1933 reopen its claim of February, 1924.

Same; amendment to claim.—Where plaintiff, a corporation, on June 21, 1927, attempted to amend its general claim for refund of

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income taxes for 1918 dated February 26, 1924, on the ground that the Commissioner had made an alleged error in decreasing its invested capital for 1918 by the deduction of excessive depreciation in prior years and such amendment did not include an allegation that the Commissioner did not allow any depreciation on furnace linings for the taxable year, plaintiff's amendment of August 30, 1933, when it first claimed depreciation on its furnace linings, came too late.

Same.—When the plaintiff amended its former general claim, to show that the Commissioner had made an error in decreasing the corporation's invested capital for 1918 by deducting excessive depreciation in prior years, such claim became a specific one and it could not later, after the statute had run, be amended by bringing in new and unrelated matter.

Same; failure to present claim to Commissioner.—The claim for the restoration to its invested capital of depreciation deducted on blast furnaces prior to their completion and use can not form a basis for the instant suit since this ground was never presented to the Commissioner, as required by the statute.

The Reporter's statement of the case:

Mr. Ralph Ulsh for the plaintiff. *Slee, O'Brian, Hellings & Ulsh* were on the brief.

Mr. S. E. Blackham, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The plaintiff in this suit seeks to recover the sum of $90,232.25 on two grounds: (1) because of an understatement of its invested capital for the year 1918 on account of the deduction of depreciation in the years 1910, 1911, and 1912 on two of its furnaces prior to the time of their completion and use; and (2) because the Commissioner did not allow any depreciation on the linings of its blast furnaces in the year in question.

The defendant defends on the grounds: (1) that the plaintiff is an assignee of the claim, and that the assignment thereof is barred under Revised Statutes 3477; (2) that it is not entitled to recover on the merits; and (3) that the taxpayer failed to file a timely claim for refund on the ground now relied on for recovery.

With reference to the claim on the merits, while the defendant admits that depreciation on plaintiff's furnaces

prior to completion and operation was erroneous, and the deduction thereof, therefore, erroneously decreased its invested capital for the year in question, it says that there was erroneously included in its invested capital an amount greater than the amount of the depreciation erroneously deducted in prior years. It also says that the plaintiff is estopped to assert this claim.

With respect to its claim for depreciation on its furnace linings, the defendant says that the plaintiff received as a deduction in the year 1917 the full amount of the expense of relining its furnaces and that the method of treating this expense was at least permissible at the time.

To these defenses the plaintiff replied that it secured the claim in question at a bankruptcy sale, which was a part of the proceedings for reorganization of the Rogers-Brown Iron Company, initiated by plaintiff, and, therefore, is not subject to the provisions of Revised Statutes 3477. On the merits it says that if the amount which the defendant insists was erroneously included in its invested capital was in fact erroneously included, it is nevertheless entitled to amortization on this amount, which, if allowed, would produce approximately the same result as if this amount were allowed to remain in its invested capital.

On the question of the statute of limitations plaintiff says that it filed a general claim for refund within time, and that its present grounds were later asserted as amendments to its general claim.

The court, having made the foregoing introductory statement, entered special findings of fact as follows, upon the stipulation of the parties and the report of a commissioner:

(In these findings we have undertaken to group together under an appropriate heading the facts relative to the several issues raised.)

PLAINTIFF'S ACQUISITION OF THE CLAIM IN SUIT

1. On and prior to September 15, 1927, The M. A. Hanna Company owned 80 percent of the preferred and common stock of the Rogers-Brown Iron Company, a New York

corporation, hereinafter sometimes referred to as the taxpayer, and was its largest creditor, owning substantially all of a bond issue of May 1, 1922, and the entire issue of debenture notes dated January 1, 1926, and a large amount of demand notes secured by warehouse receipts for iron ore.

On that date the taxpayer was insolvent.

2. Shortly prior to said date the plaintiff devised a plan of reorganization of the taxpayer, pursuant to which a new corporation was to be created, to which the taxpayer's assets were to be transferred, and which newly organized corporation was subsequently to be merged into a then existing New York corporation. In order to carry out this plan, a voluntary petition in bankruptcy was filed by the taxpayer and it was duly adjudicated a bankrupt. Subsequently the trustees sold to The M. A. Hanna Company all the property and assets of the taxpayer "real or personal, of whatsoever name and nature, and wheresoever situate (including any and all cash, trade or brand names, and goodwill), in the hands of the receivers of the bankrupt, or elsewhere, as shown by the schedules filed in this proceeding, or as existing otherwise." Thereafter, this company, in consideration of all the capital stock of the Iron Corporation of Buffalo, which had just been organized, transferred to it all of the taxpayer's bonds and debentures and other securities of the taxpayer held by The M. A. Hanna Company, and also the bid of The M. A. Hanna Company at the bankruptcy sale for the property and assets of the taxpayer, with the right to acquire said property by the performance of that bid.

The sale was confirmed and on October 4, 1927, the trustee duly transferred to the Iron Corporation of Buffalo all the property and assets of the taxpayer, as set out in the order of sale.

Subsequently the Iron Corporation of Buffalo was merged with the Buffalo Union Furnace Company, which had acquired from The M. A. Hanna Company all the capital stock of the Iron Corporation of Buffalo; and later the name of the Buffalo Union Furnace Company was changed to The Hanna Furnace Corporation, the plaintiff herein.

WAS A TIMELY CLAIM FOR REFUND FILED AND IS PLAINTIFF ESTOPPED FROM NOW ASSERTING THE CLAIMS IN SUIT?

3. On or about March 14, 1919, the taxpayer filed a tentative consolidated income-and-profits tax return for itself and its affiliated companies; and on June 13, 1919, it filed its completed return, in which it stated that its consolidated invested capital was $7,917,217.47, its consolidated net income $2,923,314.21, resulting in a total tax liability of $1,846,665.22, of which $143,791.25 was income tax, and $1,702,873.97 was excess-profits and war-profits taxes. These taxes were duly paid.

4. In making said return the taxpayer arrived at its invested capital by deducting the sum of $2,300,936.36 on account of depreciation for years prior to January 1, 1917, such sum having been previously determined by a Revenue Agent as the proper amount of depreciation sustained in such years. Slightly over two years later, on June 24, 1921, the taxpayer filed an amended return restoring to its invested capital all of said depreciation except $532,677.10. At the same time it filed a claim for refund of taxes erroneously paid in the amount of $137,403.51, based upon the excessive depreciation deducted in its original return.

5. After an audit of said return the Commissioner of Internal Revenue on October 11, 1922, wrote the taxpayer setting forth his computation of its tax liability for said year and for prior years back to 1910. The depreciation on the taxpayer's blast furnaces was figured at a straight rate of 5 percent for all years.

6. Something over a year later, on December 19, 1923, the Commissioner sent taxpayer another audit letter, in which its invested capital was largely increased and also its consolidated net income for the year 1918, resulting in a large increase in its tax liability for 1918. These increases resulted principally from the application of a 2-percent rate of depreciation on blast furnaces for years prior to 1918 and for that year, instead of 5 percent.

7. The taxpayer duly filed a protest against this proposed action, and on February 18, 1924, filed a memorandum or brief in support thereof, the same being entitled "Additional Information requested by conferee and Recomputation of

Tax Liability in accordance with Conference Agreement of February 4, 1924." This memorandum or brief recited that it was tentatively agreed at the conference that the adjustment of depreciation on blast furnaces for all years from 1910 to 1918 should be changed from 2 percent to 5 percent, the rate used by the Commissioner in his letter of October 11, 1922. It further recited that it was agreed that the Commissioner's figures in his letter of October 11, 1922, should be treated as final, subject to certain slight amendments agreed upon at the conference. There was attached a recomputation of the tax on the basis of the Commissioner's letter of October 11, 1922, with the amendments agreed on at the conference.

8. Said memorandum concluded with a statement that the taxpayer was filing a claim for refund to protect its rights under the statute of limitations.

On February 26, 1924, such a claim was filed, claiming a refund of the entire amount of tax paid by it, to wit, $1,846,665.22. Said claim reads as follows:

> The Income Tax Unit of the Bureau of Internal Revenue has examined the taxpayer's returns for the years from 1910 to 1918, inclusive, and as a result of conferences with the officials of the Bureau, it would appear that the taxpayer will be entitled to a refund of taxes for all of the years examined but at this date the final adjustment of taxes for these years has not been made the subject of a certificate of overassessment by the Commissioner of Internal Revenue.
>
> (G) The taxpayer hereby makes application for the assessment of the excess profits and war profits taxes for the year 1918 under the provisions of Sections 327 and 328 of the Revenue Act of 1918, and in support of this claim, a brief setting forth the reasons therefor will be filed with the Bureau in due course.
>
> (J) In view of the facts stated, this claim for refund is filed to protect the taxpayer's interests under the various sections and underlying regulations and rulings of the Revenue Acts of 1918 and 1921 and amendments thereto, as refer to the period of limitation within which claims for refund may be filed or suit entered, in the event that all or any part of the tax heretofore paid or assessed, or to be hereafter assessed, for the year 1918, should, in our opinion, prove to be excessive. And the taxpayer reserves the right to file additional facts in support of his claim.

It was received in the Bureau of Internal Revenue in Washington not later than March 7, 1924.

9. Thereafter, upon a final audit of the taxpayer's returns the Commissioner determined its consolidated invested capital, consolidated income, and total tax liability as computed in the taxpayer's memorandum of February 18, 1924, with only a slight variation. Pursuant thereto the Commissioner issued a certificate of overassessment of $2,231.16 for 1918, and on June 3, 1924, refunded said amount to the taxpayer. The overassessments for prior years, as shown in the taxpayer's memorandum of February 18, 1924, were likewise duly allowed by the Commissioner.

The refund for 1918 was made on the taxpayer's claim for refund filed on June 24, 1921.

10. Slightly over three years later, on June 21, 1927, the taxpayer filed with the Commissioner a brief entitled "Claim for adjustment of Income and War Profits Taxes for years 1910 to 1918, both inclusive, under the provisions of Section 284, Paragraph C, of the Revenue Act of 1926," in which refund was claimed in the amount of $68,564.43.

The basis of the claim was:

> That in determining the income and profits taxes of the Rogers-Brown Iron Company (taxpayer herein) for the taxable year 1919, the Commissioner * * * decreased the invested capital of the taxpayer by reason of the fact that the taxpayer failed to take adequate deductions for depreciation in previous years and therefore for the year 1919 the Commissioner did, in fact, adjust the surplus of the company by the sum of $466,384.90 in respect to such depreciation.

In its schedules filed in the bankruptcy proceedings, above referred to, the taxpayer listed this claim for refund.

On September 17, 1927, the Commissioner replied to the taxpayer stating that the amounts claimed were not allowable, since they had been previously allowed. Said letter concluded with the statement: "Your returns for these years are therefore considered closed."

11. No further action was taken for nearly six years, when on June 27, 1933, the plaintiff (taxpayer's successor) wrote the Commissioner requesting consideration of its claim for

refund of $1,846,665.22, filed on February 26, 1924. Said letter requested consideration of the claim—

> * * * on two separate and distinct grounds, the allowance of either of which will eliminate the necessity of considering the other. One basis of consideration is that the Bureau was in error in reducing invested capital for 1918, because of insufficient depreciation for prior years. The other basis is that if the Bureau refuses to adjust the invested capital previously determined an abnormal condition will have been brought about, requiring the application of the Special Assessment provisions of Sections 327 and 328 of the Revenue Act of 1918.

After argument in support thereof, the letter concluded by reserving the right to submit additional information.

12. The Commissioner replied, stating that careful consideration would be given to its letter.

On August 18, 1933, the Commissioner wrote the plaintiff denying special assessment because—

> * * * the audit disclosed no exceptional hardship evidenced by gross disproportion between the tax computed without benefit of the above section and the tax computed by reference to the representative corporations specified in section 328.

With reference to the other feature of the claim the Commissioner called attention to the taxpayer's memorandum filed on February 18, 1924, and to the fact that the Bureau had accepted the taxpayer's recomputation set forth therein and that he, therefore, proposed to disallow the claim, but offered an opportunity for a hearing if the taxpayer disagreed with such proposed action.

13. On August 30, 1933, the plaintiff protested against such proposed action, again urging that its claim for special assessment was well taken and also its claim that its invested capital had been improperly reduced on account of the deduction of excessive depreciation in prior years, and the plaintiff urged a further ground for recovery under its claim of February 26, 1924, as follows:

> A very substantial error has been discovered in the method of accounting for furnace relining costs in determining the taxable income for this company for the

year 1918. By virtue of the general claim for refund on file for that year, it is requested that this error be corrected in accordance with the information hereinafter set forth.

In accounting for the relining costs, the Bureau in determining taxable income, disallowed the accruals to the relining reserve and allowed as a deduction the charges to the reserve when complete relinings were made. This had the effect of allowing deductions in years when complete relinings were necessary, of excessive amounts, which amounts were applicable to other years. In the instant case the method used resulted in the allowance as a deduction of only $8,512.99 for the year 1918, whereas the amount properly applicable to that year under the present accepted method of spreading the cost of relinings over the tons of iron melted on the linings is $69,276.36, as shown in the attached Exhibit "A." Since the charge to the reserve in the amount of $8,512.99 represented only incidental current repairs, this amount should not be associated with the amount of relining cost to be spread on a tonnage basis. It is respectfully requested, therefore, that the deduction for relining cost applicable to the year 1918, be allowed in the amount of $69,276.36. This error in the treatment of relining cost is one of the several glaring inequities and injustices forced upon this taxpayer in the determination of the 1918 tax liability. The error may be accounted for from the fact that at the time when the 1918 return was being audited in 1924 the method of treating relining cost had not been definitely established. Under the present method of handling furnace relining cost the undepreciated balance of such cost in the amount of $174,281.51 as shown in Exhibit "A" as at January 1, 1918, should also be allowed as an addition to invested capital for 1918 if statutory invested capital is used in the final settlement of this case.

14. Finally, after conferences and numerous communications between the parties, the Commissioner on October 1, 1934, wrote the plaintiff advising it that he held that it had not become the owner of the claim of the Rogers-Brown Iron Company in the bankruptcy proceedings, and that,

Moreover, the records of the Bureau disclose that the claims filed by that company were finally adjusted through the issuance of a certificate of overassessment in June 1924, after the consideration, as the certificate re-

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> cited, "of all claims * * * filed" by it. Subsequently, the taxpayer was notified under date of September 27, 1927, that no further overassessment was due and that its returns were "considered closed."

The plaintiff was accordingly advised that its claim could not be entertained.

15. The claim for refund filed on February 26, 1924, was wholly rejected by the Commissioner on November 8, 1934, and notice of the rejection was sent to the plaintiff by registered mail on that date.

16. In no claim or in any other paper filed with the Commissioner of Internal Revenue did the taxpayer or the plaintiff make any specific claim on account of the deduction of depreciation on its blast furnaces prior to completion and use thereof.

REDUCTION OF INVESTED CAPITAL ON ACCOUNT OF DEPRECIATION DEDUCTED ON BLAST FURNACES PRIOR TO COMPLETION AND USE

17. In computing depreciation sustained in years prior to 1918 the Commissioner deducted depreciation on the taxpayer's blast furnaces Nos. 3 and 4 in the amount of $262,715.64 before said furnaces had been completely constructed and before they were ever in use, and plaintiff's invested capital for the year 1918 was reduced by this amount.

AMOUNTS ALLEGED TO HAVE BEEN ERRONEOUSLY INCLUDED IN THE PLAINTIFF'S INVESTED CAPITAL BY THE COMMISSIONER

18. Included in the cost of the construction of the taxpayer's blast furnaces Nos. 3 and 4 were the following items:

Discount on bonds to finance construction	$658,900.00
Interest on bonds during construction period	386,425.08
Mortgage tax	35,768.39
Legal services	13,968.78
State taxes	20,458.82
Office expense	532.09
Traveling expense	776.00
Total	1,116,829.16

For the year 1918 depreciation was deducted on this sum, less $217,000, which represented the amount of the discount on bonds which had been written off prior to January 1, 1919.

There is insufficient evidence in the record to determine the amount of depreciation deducted on the above amount in years prior to 1918.

AMORTIZATION OF DISCOUNT ON BONDS, PREMIUM THEREON, AND OTHER EXPENSES IN CONNECTION WITH THE ISSUANCE THEREOF

19. There is evidence in the record of the amount of the discount on the bonds issued and of the premium payable and other expenses in connection with the issuance thereof, but there is not sufficient evidence in the record from which to determine the period the several bonds were outstanding and, therefore, insufficient evidence from which to compute the amount to which the taxpayer may be entitled for amortization of this discount, premium, and expense.

DEPRECIATION OF FURNACE LININGS

20. In the year 1917 the taxpayer's four blast furnaces were relined at an expense of $199,366.62. Prior to and during the year 1918 the taxpayer maintained on its books a reserve for relining furnaces computed at a stated amount per ton for each ton of iron manufactured. For the years prior to 1917 the taxpayer deducted from its gross income the credits to this reserve made in the years in question.

In 1917, in auditing the taxpayer's returns for prior years, the Commissioner deducted the actual expenditures for relining in the year the expenditures were made, and disallowed in other years the credits to this reserve. In accordance with this ruling, in preparing its return for 1917, the taxpayer deducted the actual expenditures for this purpose in that year, to wit, $199,366.62, instead of the credits to this reserve of $17,909.10.

During the year 1918 the taxpayer credited to this reserve $107,743.00, computed at a rate of twenty-five cents a ton

for each ton of pig iron manufactured during the year. During the year the taxpayer expended for furnace relining the sum of $8,512.99. In making its return for 1918 it deducted from its gross income said sum of $8,512.99, but did not deduct the reserve of $107,743.00.

21. The life of the linings is indefinite, indeterminable in advance, and of relatively short duration, averaging approximately from two to three years.

22. The cost of relining each of the four furnaces in 1917, the date of the next replacement of the lining in each furnace, the number of tons of iron produced in each, the consequent average lining cost per ton of iron produced, and a distribution of such lining cost over the years 1917, 1918, 1919, 1920, and 1921 according to the tons of iron produced in each year are as follows:

Furnace #1

Blown out for relining September 17, 1917.
Blown in for operation on new lining December 20, 1917.
Blown out for next relining January 5, 1921.

Cost of relining	$76, 521. 86
Tons produced on lining	289, 896
Cost per ton	$0. 2639
Cost applicable to 1917 (2,733 tons at $0.2639)	$721. 24
Cost applicable to 1918 (108,582 tons at $0.2639)	$28, 654. 79
Cost applicable to 1919 (86,490 tons at $0.2639)	$22, 824. 71
Cost applicable to 1920 (90,592 tons at $0.2639)	$23, 907. 23
Cost applicable to 1921 (1,499 tons at $0.2639)	$413. 89

Furnace #2

Blown out for relining January 5, 1917.
Blown in for operation on new lining March 31, 1917.
Blown out for next relining September 21, 1919.

Cost of relining	$75, 173. 19
Tons produced on lining	272, 815
Cost per ton	$0. 2755
Cost applicable to 1917 (87,902 tons at $0.2755)	$24, 217. 00
Cost applicable to 1918 (107,131 tons at $0.2755)	$29, 514. 59
Cost applicable to 1919 (77,782 tons at $0.2755)	$21, 441. 60

Furnace #3

Blown out for relining July 12, 1917.
Blown in for operation on new lining August 16, 1917.
Blown out for next relining September 21, 1919.

Cost of relining	$28, 129. 91
Tons produced on lining	231, 936
Cost per ton	$0. 1212
Cost applicable to 1917 (42,059 tons at $0.1212)	$5, 097. 55
Cost applicable to 1918 (113,525 tons at $0.1212)	$13, 759. 23
Cost applicable to 1919 (76,352 tons at $0.1212)	$9, 273. 13

Furnace #4

Blown out for relining August 13, 1917.
Blown in for operation on new lining September 16, 1917.
Blown out for next relining September 21, 1919.

Cost of relining	$19, 541. 66
Tons produced on lining	210, 930
Cost per ton	$0. 0926
Cost applicable to 1917 (30,809 tons at $0.0926)	$2, 852. 91
Cost applicable to 1918 (101,734 tons at $0.0926)	$9, 420. 57
Cost applicable to 1919 (78,387 tons at $0.0926)	$7, 268. 18

The actual depreciation of the furnace linings of the taxpayer for the years 1917, 1918, and 1919, based upon the actual life of the linings and the number of tons of pig iron produced in each furnace, was $32,888.70 for 1917, $81,349.18 for 1918, and $60,807.62 for 1919.

23. If taxpayer's income and invested capital were adjusted by the deduction of the depreciation for 1917 and 1918 on the foregoing basis, there would be a deficiency in taxes for 1917 of $29,205.85, and an overpayment of taxes for 1918 of $71,737.06.

24. For thirty-five years the practice in the pig-iron industry has been that followed by the taxpayer prior to 1918, of setting up on its books a reserve for the replacement of furnace linings computed at a fixed sum per ton for each ton of pig iron manufactured during the year, but in 1917 and 1918 this practice had not been approved by the Commissioner of Internal Revenue. This is the practically universal practice today, and has now been approved by the Commissioner.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff's suit is based on two grounds: (1) It alleges that the Commissioner, in computing the taxpayer's liability for 1918, erroneously decreased its invested capital by deducting in prior years depreciation on certain of its blast furnaces prior to the time they had been completed and put in operation; and (2) that no deduction was taken for depreciation on the linings of its blast furnaces in the taxable year.

The defendant defends on the ground, among others, that no claim for refund on these grounds was filed within the statutory period. The plaintiff replies to this that a general claim for refund was filed within the statutory period and that this was subsequently amended to include these grounds.

No claim filed with the Commissioner ever specifically stated that depreciation had been deducted in prior years on certain of its blast furnaces before they had been completed and put in use, but the plaintiff says that some of its amendments were broad enough to cover this allegation. The first claim with respect to depreciation on furnace linings was made on August 30, 1933.

We think this amendment came too late for two reasons: first, because the Commissioner had previously rejected plaintiff's claim for refund; and, second, if his action did not amount to a rejection thereof, still, the former general claim had previously been amended on a specific ground, which did not include a claim for depreciation on furnace linings, and was not subject to further amendment.

Plaintiff filed a general claim for refund on February 26, 1924. This was filed under these circumstances: When the taxpayer filed its income-tax return for 1918 it decreased its invested capital by the sum of $2,300,936.36 on account of depreciation which the Commissioner had found had accrued in years prior to 1917. About two years later the taxpayer came to the conclusion that this was too much depreciation to have been deducted and filed an amended return reducing the amount of depreciation to $582,677.10. This resulted, of

course, in an increased invested capital for the year 1918 and a smaller amount of tax due. Accordingly, the taxpayer filed a claim for refund on June 24, 1921, for $137,403.51.

After auditing the taxpayer's returns the Commissioner wrote it on October 11, 1922, setting forth his computation of its tax liability. In this letter he deducted depreciation at the rate of 5 percent for the year 1918 and for years prior thereto. About a year later, however, the Commissioner wrote the taxpayer another letter setting forth a recomputation of the taxpayer's liability, which differed from his former computation chiefly because he applied a rate of depreciation of 2 percent for the year 1918 and prior years instead of 5 percent. The taxpayer protested against this action, and at a conference with the Commissioner tentatively agreed with him on a rate of depreciation of 5 percent, as originally used by him, and, generally, that his computation in his letter of October 11, 1922, with slight adjustments, was correct.

At this conference certain additional facts were requested by the Commissioner, which were furnished him by the taxpayer on February 18, 1924, and at the same time the taxpayer set forth its recomputation of its tax liability, using the rate of 5 percent in computing depreciation, instead of 2 percent. The taxpayer also stated in its communication that it was filing a claim for refund to protect its rights under the statute of limitations. This claim was filed on February 26, 1924, and is the general claim upon which the plaintiff relies in this suit.

Subsequent thereto the Commissioner wrote the taxpayer adopting the taxpayer's computation of its tax liability, which showed an overpayment of tax of $2,231.16. This amount was refunded to the taxpayer on June 3, 1924. This refund was made on the claim filed on June 24, 1921, and no mention was made of the general claim filed on February 26, 1924, but apparently the parties considered this as a final adjustment of the taxpayer's liability because no further action was taken with reference thereto for more than three years. However, shortly prior to the time that the taxpayer went into bankruptcy, and apparently in preparation therefor, it filed with the Commissioner a paper entitled, "Claim

for adjustment of Income and War Profits Taxes for years 1910 to 1918, both inclusive, under the provisions of Section 284, Paragraph C, of the Revenue Act of 1926," in which a refund was claimed in the amount of $68,564.43. This did not mention the general claim of February 26, 1924. This claim was subsequently listed by the taxpayer in its schedules filed in the bankruptcy proceedings.

It is doubtful whether or not the taxpayer under the law was entitled to file this claim. It was not entitled to do so as an original claim, since the statute had long since run, and it is questionable whether or not it could have filed it as an amendment to its claim of February 26, 1924, since the Commissioner's action in refunding to the taxpayer the $2,231.16 was evidently intended to be final action on the taxpayer's liability for that year, and if final action, by implication the claim of February 26, 1924, was thereby rejected. We have no doubt that when this refund was made the Commissioner overlooked the fact that the taxpayer had filed this claim of February 26, 1924.

But even if the taxpayer did have the right to file this claim on June 21, 1927, as an amendment to its claim of February 26, 1924, we think this claim, as amended, was rejected by the Commissioner on September 17, 1927. On that date the Commissioner wrote the taxpayer stating that the amounts claimed were not allowable because they had been previously allowed, and the letter concluded with the statement: "Your returns for these years are therefore considered closed." He made no reference to the claim for refund of February 26, 1924, but we think that his statement, "Your returns for these years are therefore considered closed," under all the circumstances, amounts to a rejection of this claim. Plaintiff's returns could not be closed so long as there was a claim for refund outstanding.

It is evident that the parties themselves so understood the Commissioner's action, because nothing further was done in the matter for nearly six years.

We do not regard it as essential that the Commissioner in so many words should say that the claim was disallowed or that a disallowance of it should appear on a schedule signed by the Commissioner. [*Pratt & Whitney Co.* v.

United States, 80 C. Cls. 676, 681, 6 F. Supp. 574; *United States* v. *Bertelsen & Petersen Eng. Co.*, 306 U. S. 276, 280; *Savannah Bank & Trust Co.*, v. *United States*, 75 C. Cls. 245, 248, 58 F. (2d) 1068.] The only requirement of the law at that time was that the Commissioner should notify the taxpayer of his action by mail. This he did.

On June 27, 1933, the taxpayer apparently discovered that there had been no formal action on its claim of February 26, 1924, and undertook to reopen it, but we think its long silence prior thereto shows that at the time the Commissioner acted in 1927 the taxpayer treated that as final action and, therefore, as a rejection of its outstanding claim. It is clear the Commissioner so intended it.

If the taxpayer's claim had been rejected, it, of course, was not subject to later amendment after the statute had run.

But whether or not we are correct in the foregoing, we think the taxpayer's amendment of August 30, 1933, when it first claimed depreciation on its furnace linings, came too late. The amendment of plaintiff's general claim on June 21, 1927, if such it can be treated, was based upon the Commissioner's alleged error in decreasing its invested capital for 1918 by the deduction of excessive depreciation in prior years. This, of course, did not include the allegation that he did not allow any depreciation on furnace linings for the taxable year.

When the taxpayer amended its former general claim it then became a specific one, and under the decisions of the Supreme Court in *United States* v. *Henry Prentiss & Co., Inc.*, 288 U. S. 73, and *United States* v. *Factors & Finance Co.*, 288 U. S. 89, it could not later, after the statute had run, be amended by bringing in new and unrelated matter. In the last cited case the court said:

> This is not a case where the grounds injected by the amendment have already been abandoned by agreement tacit or express. Such abandonment and agreement there was in the *Prentiss* case, the claimant seeking at the beginning the privilege of the special method of assessment and reverting thereafter to another ground of challenge which by implication, if not

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expressly, it had promised to renounce. This is a case where the claimant has left the grounds of challenge open, and where the Bureau has itself to blame for not insisting at the outset upon a full disclosure of the grievance.

But, with respect to its right to rely on its claim that depreciation was deducted on some of its furnaces prior to their completion, the taxpayer says that its claim for special assessment, included in its general claim of February 26, 1924, called in question the entire valuation of its invested capital, which includes the matter of deducting depreciation on blast furnaces prior to their completion and use, and, therefore, under the authority of *Bemis Bro. Bag Co.* v. *United States*, 289 U. S. 28, it is entitled to later amend its general claim by asserting this specific error.

In the first place, neither the taxpayer nor its successor ever presented this alleged error to the Commissioner; it was first asserted in this suit. The Commissioner's regulations required the taxpayer to set out under oath all the facts relied on in support of its claim, and this regulation was never waived. The law provides that no suit shall be maintained until a claim for refund shall have been filed with the Commissioner according to law "and the regulations of the Secretary of the Treasury established in pursuance thereof."

In the *Bemis Bro. Bag Company* case, *supra*, the ground for the claimed overassessment was specifically stated. No new ground was advanced; only a different form of relief on the same ground was prayed.

In the second place, this claim for special assessment later, and before any action thereon by the Commissioner, was restricted solely to the claim of an abnormal condition affecting its invested capital; a later amendment complaining of the Commissioner's action in determining its value is not relevant thereto. *United States* v. *Henry Prentiss & Co., Inc.*, *supra*.

The claim for the restoration to its invested capital of depreciation deducted on blast furnaces prior to their completion and use cannot form a basis of this suit because this

ground was never presented to the Commissioner. Nor can the claim for depreciation on the linings of blast furnaces be allowed, first, because it was presented after rejection of the claim by the Commissioner; and, second, because it was not included in the amendment of the general claim filed on June 21, 1927.

This view makes it unnecessary to discuss the other issues raised.

It results that plaintiff's petition must be dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

THE COLUMBIA PLANOGRAPH COMPANY, INC., A CORPORATION v. THE UNITED STATES

[No. 43435. Decided February 5, 1940]

On the Proofs

Government contract for printing under the N. I. R. A. Act.—Where plaintiff, under a contract with the Department of Commerce, furnished a quantity of photolithographic posters for the use of the National Industrial Recovery Administration, and received pay therefor out of the appropriation for the National Industrial Recovery Administration under the Fourth Deficiency Appropriation Act for the fiscal year 1933, approved June 16, 1933, it is held that such contract and payment were legal.

Same; discretion of the President.—The contract for N. I. R. A. posters was clearly authorized to be made in the discretion and under the direction of the President notwithstanding the provisions of the act of March 1, 1919, and the act of February 28, 1929, requiring all Government printing to be done by the Government Printing Office, with certain exceptions stated in said acts.

Same; delegation of authority by the President.—The contract for N. I. R. A. posters was made by the Department of Commerce pursuant to authority duly delegated by the President under the discretion vested in him by the National Industrial Recovery Act and the provisions of the deficiency appropriation act under which the payment in question was made.

The Reporter's statement of the case:

Mr. George L. Hart, Jr., for the plaintiff. *Mr. Louis B. Montfort* was on the brief.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Henry A. Julicher* was on the brief.

Plaintiff seeks to recover $7,109.15 admittedly due it under two contracts with the Patent Office which amount the Comptroller General withheld and applied against an alleged indebtedness of plaintiff to the Government claimed to have arisen as a result of payment by the defendant to plaintiff of that amount under a previous contract for the furnishing by plaintiff of 1,000,000 N. R. A. blue eagle posters. The Comptroller General took the position that the contract for the N. R. A. posters was contrary to law and, therefore, void, and that the amount of $7,109.15, which had theretofore on January 16, 1936, been paid to plaintiff thereunder, was an illegal payment.

The court, having made the foregoing introductory statement, entered special findings of fact, as follows:

1. The plaintiff is a Delaware corporation with principal place of business in Washington, D. C., and is engaged in the business of reproducing various matters, including maps, charts, and drawings, by the process of photolithography.

2. Plaintiff had performed two photolithographic reproducing contracts for the defendant: One under the contract entered into in 1934, for which it was paid; and another under two contracts entered into in 1935, for which it was paid the difference between the contract price thereunder and the contract price for the articles furnished under the first contract.

Defendant interposes a counterclaim for the sum paid to plaintiff under the first contract as being illegal and erroneous because no authority existed under section 11 of the act of March 1, 1919, 40 Stat. 1270, and the regulations of the Joint Committee on Printing for any printing to be done in the District of Columbia other than in the Government

Printing Office, unless contracted for by the Public Printer in accordance with the act of February 28, 1929, 45 Stat. 1387, 1400. Plaintiff in its replication denies this contention of defendant.

3. The process most in use is known as letter-press or relief printing, which is done either from type or from plate, or what is called by the trade above the surface.

The various matters reproduced by plaintiff were by the process of photolithography. The use of the camera has a part in making the plate for the reproducing process. The completed plate is a perfectly flat surface, that is, the design of the matter to be reproduced being neither raised above the surface nor cut below the surface of the plate. The design from the plate is transferred to a rubber cylinder and then to paper. This process or method of reproducing is known to the trade as offset printing, which is synonymous with photolithography. A special committee composed of representatives of the Government Printing Office, the Joint Congressional Committee on Printing, and the Director of the Bureau of the Budget considered, in 1938, what should constitute "printing" within the meaning of that term as used in the act of March 1, 1919, and decided that work of the type furnished by plaintiff under Contract Cc2068 in August 1934 did not come within the term "printing," as used in that act. So far as material here, that decision was as follows:

> * * * the committee is of the opinion that the term "printing," as used in the last proviso of * * * section 11 * * * of the Act * * *, approved March 1, 1919, * * * insofar as it relates to printing for the executive departments, independent offices, or establishments of the Government in the District of Columbia, or elsewhere, shall include pamphlets, books, documents, periodicals, and other publications of a permanent character, also blank books and standardized forms, but shall not include matter reproduced by what is commonly known as the mimeograph or stencil process, *nor shall it include reproductions by other duplicating processes if confined strictly to matter required currently in the performance of functions*

authorized by law, such as rules, regulations, instructions, opinions, decisions, *notices, circulars*, statistical statements, *and other informational matter, and if no binding, sewing, or trimming operation is involved* in connection therewith. [Italics supplied.]

This opinion and a letter from the Comptroller General to the Director of the Bureau of the Budget on June 1, 1938, approving the definition adopted by the Joint Committee on Printing are set forth on pp. 22, 23, and 24 of the annual report of the Public Printer to Congress for 1938, in evidence as plaintiff's exhibit 12 and made a part hereof by reference.

4. August 23, 1934, the plaintiff entered into Contract No. Cc2068 with the United States Department of Commerce to furnish 1,000,000 N. R. A. posters, size nineteen by twenty-three inches, red and blue, deliveries to begin in five days. Under this contract plaintiff furnished to the United States Department of Commerce 1,000,000 N. R. A. posters reproduced by the photolithographic process, which posters were accepted and received by the United States Department of Commerce for the National Recovery Administration. The contract price for the posters was $7,109.15, which sum was paid to plaintiff on October 27, 1934.

5. May 14, 1935, plaintiff entered into two contracts, Nos. 5340–74 and 5340–71, with the Commissioner of Patents, whereby plaintiff undertook to make by the photolithographic process for the United States Patent Office during the fiscal year ending June 30, 1936, certain copies of current drawings for designs and certain copies of each page of exhausted patents, designs, and other papers. Under these contracts the plaintiff during July and August, 1935, made by the photolithographic process and furnished to the United States Patent Office copies of designs and patents, the agreed price of which was the sum of $8,071.40. The work was delivered to and accepted by the United States Patent Office.

January 16, 1936, by settlement No. 0386347, the amount of $7,109.15 previously paid to plaintiff, referred to in finding 4, out of appropriation "National Industrial Recovery,

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National Recovery Administration 1933–April 1, 1936," under N. R. A. Contract Cc2068, was deducted from the amount of $8,071.40 due plaintiff under the two Patent Office contracts, Nos. 5340–74 and 5340–71, and the balance of $962.25 was paid to plaintiff.

6. The Comptroller General deducted the payment previously made under N. R. A. Contract No. Cc2068 of August 23, 1934, from the money due on the two Patent Office Contracts, Nos. 5340–74 and 5340–71 of May 14, 1935, on the ground that the services involved in reproducing the N. R. A. posters by the photolithographic process were printing and that there was no authority for any printing to be done in the District of Columbia other than at the Government Printing Office unless contracted for by the Public Printer under Section 11 of the Act of March 1, 1919, 40 Stat. 1270, and the Act of February 28, 1929, 45 Stat. 1400.

The N. R. A. posters were not produced by plaintiff under a contract by the Public Printer, nor did he authorize this work to be done outside the Government Printing Office.

7. The Government Printing Office for the past thirteen years has been equipped to make reproductions by the photolithographic process. At the time plaintiff performed the contract referred to in finding 4, the Government Printing Office was equipped to do that work by the photolithographic process.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The facts show that in August 1934 plaintiff made a contract with the United States through the Department of Commerce to furnish the Government a quantity of N. R. A. posters reproduced by the photolithographic process for which the Government agreed to pay plaintiff $7,109.15. The required number of posters was made and delivered by plaintiff and was received and accepted by the Government through the Department of Commerce for the National Recovery Administration, and plaintiff was duly paid there-

for on October 27, 1934, out of the appropriation for "National Industrial Recovery, National Recovery Administration 1933–April 1, 1936." Thereafter, in May 1935, plaintiff entered into two contracts with the Commissioner of Patents to furnish during the fiscal year ending June 30, 1936, certain copies reproduced by the photolithographic process of current drawings for designs and certain copies of each page of exhausted patents, designs, and other papers. This work was performed by plaintiff during July and August 1935 and the total contract price therefor was $8,071.40. The articles called for by these contracts were made and delivered to and accepted by the Commissioner of Patents. On January 16, 1936, the Comptroller General withheld $7,109.15 due plaintiff under the Patent Office contracts and applied the same to an alleged illegal payment in that amount to plaintiff under the N. R. A. contract of August 1934 and paid plaintiff the balance of $962.25 due it under the Patent Office contracts.

The defendant has interposed a counterclaim for the amount withheld and deducted by the Comptroller General from the amount due plaintiff under the contracts of May 1935 with the Commissioner of Patents.

The basis of the counterclaim is that the amount of $7,109.15 paid to plaintiff under and pursuant to the contract of August 1934 for making and delivering 1,000,000 N. R. A. posters was an erroneous and illegal payment for the reason that no authority existed under section 11 of the act of March 1, 1919, 40 Stat. 1270, and the regulations of the Joint Committee on Printing for any printing to be done in the District of Columbia other than by the Government Printing Office unless contracted for by the Public Printer in accordance with the act of February 28, 1929, 45 Stat. 1400.

Section 11 of the act of March 1, 1919, so far as material here, provided that "on and after July 1, 1919, all printing, binding, and blank-book work for Congress, the Executive Office, the judiciary, and every executive department, independent office, and establishment of the Government, shall be done at the Government Printing Office, except such

classes of work as shall be deemed by the Joint Committee on Printing to be urgent or necessary to have done elsewhere than in the District of Columbia for the exclusive use of any field service outside of said District."

The act of February 28, 1929, *supra*, provided, so far as material here, "that hereafter such printing, binding, and blank-book work authorized by law, as the Public Printer is not able or equipped to do at the Government Printing Office, may be produced elsewhere under contracts made by him with the approval of the Joint Committee on Printing."

We are of opinion that plaintiff is entitled to recover the amount withheld by the Comptroller General for the reason that the contract of August 1934 under which the posters were made and furnished was legal and proper under section 2 (a) and (b) of the National Industrial Recovery Act, 48 Stat. 195, and the provisions of the Fourth Deficiency Act for the fiscal year 1933, approved June 16, 1933, 48 Stat. 275, appropriating $3,300,000,000 for carrying into effect the provisions of the National Industrial Recovery Act.

Under Title 1, Section 1 of the National Industrial Recovery Act, Congress declared a national emergency to exist. It further declared a policy to diminish obstructions to the free flow of interstate commerce, to provide for the general welfare by promoting the organization of industry for cooperative action among trade groups, and otherwise to rehabilitate industry. Section 2 provided as follows:

> (a) To effectuate the policy of this title, the President is hereby authorized to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the provisions of the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, as he may find necessary, to prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, to fix the compensation of any officers and employees so appointed.
>
> (b) The President may delegate any of his functions and powers under this title to such officers, agents, and

employees as he may designate or appoint, and may establish an industrial planning and research agency to aid in carrying out his functions under this title."

Section 220 authorized an appropriation for the purposes of carrying into effect the provisions of the act, and under the Fourth Deficiency Act for the fiscal year 1933, approved June 16, 1933, *supra*, the following appropriation, among others, was made:

> *For the purpose of carrying into effect the provisions of the Act entitled "An Act to encourage national industrial recovery, to foster fair competition*, and to provide for the construction of certain useful public works, and for other purposes," approved June 16, 1933, and also for the purpose of carrying into effect the provisions of the Act entitled "An Act for the relief of unemployment through the performance of useful public work, and for other purposes," approved March 31, 1933, *and for each and every object thereof, to be expended in the discretion and under the direction of the President, to be immediately available, and except as hereinafter provided to remain available until* June 30, 1935, $3,300,000,000 * * *. [Italics supplied.]

The contract of August 1934 with the Department of Commerce for 1,000,000 N. R. A. posters which plaintiff made and supplied, and for which it was paid, was clearly authorized to be made in the discretion and under the direction of the President notwithstanding the provisions of the act of March 1, 1919, and the act of February 28, 1929. The contract for the N. R. A. posters was made by the Department of Commerce pursuant to authority duly delegated by the President under the discretion vested in him by the National Industrial Recovery Act and the provisions of the appropriation act under which the payment in question was made.

In these circumstances and under the decision of this court in *American Lithographic Co.* v. *United States*, 57 C. Cls. 340, 356, plaintiff is entitled to recover. In the *American Lithographic* case the Treasury Department entered into a contract for 500,000 lithographic posters. The plaintiff

brought suit in this court for the work performed under the contract and the defendant interposed a defense, among others, that the contract was illegal under section 3786 R. S., the provisions of which were similar to the act of March 1, 1919, relied upon in the case at bar. This court said:

> Another obstacle, quite anomalous, is interposed to forestall recovery under the express contract, a defense which, if meritorious, would necessarily involve the officers of the defendant in violation of express statutory law. A counterclaim is pleaded. Its worthiness is alleged to depend upon the express mandate contained in section 3786 Revised Statutes, which, in terms, provides as follows:
>
> "All printing, binding, and blank books for the Senate and House of Representatives and for the executive and judicial departments shall be done at the Government Printing Office, except in cases otherwise provided by law."
>
> We think we need only quote section 8 of the act of April 24, 1917, first Liberty Loan act, 40 Stat. 35, 37, to dispose of the contention. It is as follows:
>
> "That in order to pay all necessary expenses, including rent, connected with any operation under this act, a sum not exceeding one-tenth of one per centum of the amount of bonds and one-tenth of one percentum of the amount of certificates of indebtedness herein authorized is hereby appropriated, or as much thereof as may be necessary, out of any money in the Treasury not otherwise appropriated, to be expended as the Secretary of the Treasury may direct."
>
> The scope, purpose, and intent of the Liberty loan act authorized what was done in this case.

Judgment will be entered in favor of plaintiff for $7,109.15. It is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

ALTA ELECTRIC AND MECHANICAL COMPANY, INCORPORATED, v. THE UNITED STATES

[No. 43546. Decided February 5, 1940]

On the Proofs

Government contract; right to withdraw bid before acceptance.—Where contractor, in response to an invitation by the Bureau of Yards and Docks, Navy Department, submitted a bid for furnishing certain materials and performing certain work at the Mare Island Navy Yard, and where after said bid was submitted but before said bid was accepted, contractor discovered that it had made an erroneous calculation, based on a misunderstanding of a subcontractor's proposal and price; and contractor thereupon requested that it be permitted to withdraw said bid because of said error, and such permission was refused by the defendant, and thereafter the contractor refused either to enter into a contract or to furnish the material and perform the work covered by the bid, it is held that the action of the Comptroller General in withholding from plaintiff out of moneys due plaintiff under another, subsequent contract the difference between contractor's bid on the Mare Island project and the next lowest bid was illegal.

Same.—Plaintiff, it is held, had the right to withdraw its bid and having had this right could not be penalized because of its refusal to sign the contract or to perform the work or to furnish the material contemplated by the bid.

The Reporter's statement of the case:

Mr. C. F. Rothenburg for the plaintiff. *Hamel, Park & Saunders*, and *Messrs. Raymond Benjamin* and *Walter A. Dold* were on the briefs.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court, upon the report of a commissioner and the stipulation of facts made the following special findings of fact:

1. The plaintiff, Alta Electric and Mechanical Company, Inc., is a domestic corporation organized pursuant to and

at all times hereinafter mentioned existing under the laws of the State of California, with its principal office at 467 O'Farrell Street, San Francisco, California.

2. On December 27, 1933, the Alta Electric and Mechanical Company, Inc., plaintiff herein, received from the defendant, acting through the Navy Department (Bureau of Yards and Docks), an invitation to submit a sealed bid on a contract under specification number 7588, hereinafter referred to as the Mare Island Project, covering the furnishing of all materials and performing all work required for installing at the Mare Island Navy Yard, California, two 200-horsepower horizontal water tube boilers, with solid brick settings, four combination gas and oil fully automatic burners and accessories pertaining thereto.

Pursuant to the invitation plaintiff on December 30, 1933, requested from the Ray Burner Company, San Francisco, hereinafter called plaintiff's subcontractor, a quotation on the cost of and the price of installation of the four combination gas and oil fully automatic burners, to be installed with attendant controls at the Mare Island Project, under Section 6 of specification No. 7588.

In answer to its request the plaintiff received from its subcontractor a letter dated January 9, 1934, the pertinent portion of which read as follows:

> Since quoting on the combination gas and oil fully automatic burners to be installed under the above specification, we have had requests for bids on the complete installation of this equipment, and are pleased to submit our quotation herewith;
>
> We will install the four burners, complete with all the controls, including switchboard for automatic controls and entrance of power into the boiler room; all oil and gas piping, including the furnishing of all material to be used in conjunction therewith—for a net price of $1,850.00.

The amount of $1,850.00 was assumed by plaintiff to include the price of the burners together with the cost of installation thereof.

3. On January 16, 1934, plaintiff filed with the defendant its bid on the Mare Island Project in the sum of $25,950.00,

which bid included the subcontractor's bid of $1,850.00, which amount plaintiff assumed to include not only the price of but the installation cost of the aforesaid burners.

The bid submitted by plaintiff contained, among others, the following stipulation:

> In compliance with the above invitation for bids, and subject to all the conditions thereof, the undersigned offers and agrees, if this bid be accepted within 60 days (if a different period be not specified) from the date of the opening, to furnish the supplies, services, buildings, or work, as the case may be, upon which prices are quoted, at the price set opposite each item, within the time stipulated on the attached schedule.

At the same time plaintiff executed a bid bond in the sum of $2,500 with the Massachusetts Bonding and Insurance Company, as surety thereon, the pertinent condition and obligation of which follows:

> The condition of this obligation is such that whereas the principal has submitted the accompanying bid, dated January 16th, 1934, for furnishing and installing two 200 H. P. boilers complete, including settings and auxiliaries at Navy Yard, Mare Island, under Specification #7588.
>
> Now, therefore, if the principal shall not withdraw said bid within the period specified therein after the opening of the same, or, if no period be specified, within sixty (60) days after said opening, and shall within the period specified therefor, or, if no period be specified, within ten (10) days after the prescribed forms are presented to him for signature, enter into a written contract with the Government, in accordance with the bid as accepted and give bond with good and sufficient surety or sureties, as may be required, for the faithful performance and proper fulfillment of such contract, or in the event of the withdrawal of said bid within the period specified, or the failure to enter into such contract and give such bond within the time specified, if the principal shall pay the Government the difference between the amount specified in said bid and the amount for which the Government may procure the required work and/or supplies, if the latter amount be in excess of the former, then the above obligation shall be void and of no effect, otherwise to remain in full force and virtue.

4. On January 16, 1934, all bids submitted to defendant on the Mare Island Project were opened, and it was disclosed that the defendant had received the following bids:

Alta Electric and Mechanical Company, Inc.	$25, 950. 00
R. G. Meyler Corporation	31, 700. 00
Herman Lawson	32, 600. 00
California Steel Products Company	33, 978. 00

Thereafter plaintiff checked its bid to ascertain the cause of the extreme discrepancy between its bid and that of R. G. Meyler Corp., the next lowest bidder, and it was found that the bid of plaintiff's subcontractor in the sum of $1,850.00, contained in its letter dated January 9, 1934, was a proposal for the installation of the four burners only and that the cost price of the burners had been quoted in the sum of $5,650.00 in a letter written by the subcontractor to plaintiff prior to January 9, 1934. Said prior letter was never received by plaintiff.

On January 17, 1934, before any bid had been accepted by defendant on specification 7588, plaintiff addressed and mailed to defendant the following letter requesting permission to withdraw its bid without penalty to itself:

> Navy Department,
> Bureau of Yards and Docks,
> Public Works Office,
> Mare Island, California.
> (attention of Captain Whitman.)
>
> GENTLEMEN: In connection with our proposal of January 16, 1934, for furnishing and installing auxiliary high pressure boilers at the Navy Yard, Mare Island, California, in accordance with Y and D Specification #7588 in the sum of $25,950, we respectfully ask permission to withdraw this bid without penalty to ourselves, for the following reasons:
>
> In making up the bid sheet we used an apparently complete proposal of the Ray Burner Company in the amount of $1,850. It now appears that this letter of the Ray Burner Company was a proposal for installation of equipment only, the value of the equipment being $5,650, and having been described and quoted on in a previous letter which the Ray Burner Company claims was mailed to us but which we never received. We attach hereto a copy of the Ray Burner proposal which is interpreted by us as being a complete bid.
>
> We feel that in the event of the contract being awarded to us and our being compelled to go thru with it, that

we would be able to legally hold the Ray Burner Company for furnishing and installing all the equipment under this proposal.

Inasmuch as it is not our wish to penalize anyone, nor do we believe it is the wish of the Navy Department to take advantage of a palpable error, and also in view of the fact that our proceeding with the work in accordance with our proposal would involve ourselves and the Ray Burner Company possibly in long, drawn-out litigation which might delay the progress of the work, we feel that it is to the best interests of all concerned that the Navy Department permit our bid to be withdrawn.

Thanking you for your courteous consideration, we remain,

Yours Respectfully,

ALTA ELECTRIC AND MECHANICAL COMPANY, INC.

On January 29, 1934, the defendant, through the Chief of the Bureau of Yards and Docks, Navy Department, denied plaintiff's request to withdraw its proposal and accepted its bid in the sum of $25,950, the lowest bid received. This decision was affirmed by the Navy Department by telegram dated February 23, 1934.

5. After acceptance by the defendant of its bid on the Mare Island Project, plaintiff sought to reach a settlement with its subcontractor concerning the price of and the installation of the oil burners, but the Ray Burner Company refused to make any reduction in the price of its burners in the sum of $5,650, referred to in Finding 4. On February 6, 1934, the subcontractor withdrew its bid on the gas and oil burning equipment.

Plaintiff refused either to sign a contract with defendant or to perform the work or furnish the material covered by Specification No. 7588 and contemplated by the bid submitted by plaintiff to the Navy Department at Mare Island. Defendant thereupon accepted the bid of $31,700.00 submitted by the R. G. Meyler Corporation, the next lowest bidder.

The General Accounting Office sent notice of settlement, No. U. S.–3860N, to plaintiff on October 7, 1934, reading as follows:

> The Claim of the United States for $5,750.00 on account of excess cost over amount of bid by you for the installation upon a concrete floor to be furnished by the Government at the Navy Yard, Mare Island, California,

of two 2,000-horsepower horizontal type boilers, with solid brick settings, etc., for the price of $25,950, has been settled and the sum of Five Thousand Seven Hundred Fifty Dollars and no cents has been found due the United States per above certificate number. The amount due should be remitted to this office promptly by check, draft, or money order payable to the "United States."

The record discloses that upon your claim of error in bid and refusal to give bond and sign a contract for the performance of the work in accordance with your bid, it was necessary for the Government to make award to the next lowest bidder, R. G. Meyler Corporation, Los Angeles, California, for $31,700, or at a price of $5,750 in excess of your bid.

The bond filed with your bid obligated you not to withdraw the bid or refuse to enter into a contract if your bid was accepted within a given time, and upon your refusal to enter into a contract you became liable to the Government for the difference between the amount specified in your bid and the amount which it cost the Government to have the required work done.

Plaintiff refused and at all times thereafter refused to comply with the demand to remit to the defendant the sum of $5,750.00, or any part thereof.

6. On October 16, 1934, plaintiff entered into a contract with the defendant, represented by the Chief of the Bureau of Yards and Docks, acting under the direction of the Secretary of the Navy, for the construction of an electrical distribution system and the erection of two substation buildings and equipment at the Navy Yard, Pearl Harbor, Territory of Hawaii.

The Pearl Harbor contract was numbered NOy–2272 (Spec. 7604) and involved construction work entirely separate and apart from the Mare Island Project covered by specification numbered 7588.

7. On October 16, 1934, the plaintiff gave bond in form and substance as required by the aforesaid contract which bond was approved and accepted by the defendant through the Navy Department represented by C. C. Bloch, Judge Advocate General.

On or about February 21, 1935, plaintiff duly entered upon performance of its obligations under the Pearl Harbor contract, and completed performance on December 12, 1935, with-

in the prescribed time. The plaintiff has in every respect fully and completely performed all its undertakings and promises contained in this contract, and complied with all conditions precedent to performance on the part of defendant under the contract.

8. On or about April 30, 1935, the first partial or progress payment under the terms of the Pearl Harbor contract became due and payable to plaintiff in the sum of $5,750. On June 18, 1935, the voucher for that amount was approved by the Bureau of Yards and Docks and transmitted to the Claims Division, General Accounting Office, as set-off against the asserted indebtedness of plaintiff to the defendant on the Mare Island Project as hereinbefore set forth in the notice of claim, dated October 7, 1934, quoted in Finding 5 of these findings.

9. The following notice of settlement of claim dated August 29, 1935, was issued by the Comptroller General:

> Notice of Settlement of Claim
> GENERAL ACCOUNTING OFFICE
> Certificate No. 0371745.
> Claim No. 0481082 (1) Washington, D. C.,
> Aug. 29, 1935.
> Navy.
> Alta Electric & Mechanical Company, Inc.
> 467 O'Farrell Street, San Francisco,
> California.
> Check to issue as noted below:
> I have certified that there is due you from the United States, payable from the appropriation(s) indicated, the sum of
> Five Thousand seven hundred fifty dollars ($5,750.00) on account of
> First partial payment for work performed in constructing an electrical distribution system, etc., at the Navy Yard, Pearl Harbor, T. H., April 30, 1935, under contract No. NOy-2272, dated October 16, 1934 (Navy-Bur. Sys. & Accts. Cl. Voucher No. 9400).
> 7-03/5640.1 National Industrial Recovery, 1933-1935
> Navy, Yards and Docks
> Check to issue:
> Treasurer of the United States for deposit as by claimant as a set-off against its indebtedness to the United States in a like amount, on account of default in failing to execute a contract and bond and to perform in accordance with accepted bid calling for installation upon a concrete

floor to be furnished by the Government at the Navy Yard, Mare Island, Calif., of two 200-horsepower horizontal type boilers, with solid brick settings, etc., necessitating award to the next lowest bidder at an excess cost to the United States of $5,750.00. Deposit of said amount to be made to the credit of Miscellaneous Receipts "(4275) Reimbursement, Excess Cost over Contract Price (Navy Department)." Payable by Navy Disbursing Officer, Navy Department, Washington, D. C.

J. R. McCARL,
Comptroller General of the United States.
By J. H. ROE.

To claimant(s).

10. Pursuant to the notice of settlement, the amount of $5,750.00 was, on September 14, 1935, covered by defendant into the United States Treasury by its Treasurer under direction of the Secretary of the Treasury.

11. The plaintiff protested the application of the first partial payment by the defendant and has made frequent demands for the payment upon defendant through the Comptroller General of the United States. The defendant has persistently failed and refused to make the payment or any part thereof to the plaintiff.

12. Plaintiff has no other remedy or recourse in the Executive Branch of the Government to secure said payment.

The court decided that the plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover the sum of $5,750 alleged to be due under a contract entered into between plaintiff and the defendant, represented by the Bureau of Yards and Docks, Navy Department, for the construction of an electrical distribution system, and the erection of two substation buildings and equipment, at the Navy Yard, Pearl Harbor, Hawaii. Plaintiff completely performed the work under the contract within the time prescribed and has been paid the contract price, except the sum of $5,750, the amount of the first partial or progress payment, a voucher for the payment of which amount was duly approved by the Bureau of Yards and Docks and forwarded to the Comptroller General of the United States, who notified plaintiff of his approval of the

voucher with the direction that the check issue to the "Treasurer of the United States for deposit as by claimant as a set-off against its indebtedness to the United States in a like amount, on account of default in failing to execute a contract and bond and to perform in accordance with accepted bid calling for installation upon a concrete floor to be furnished by the Government at the Navy Yard, Mare Island, Calif., of two 200-horsepower horizontal type boilers, with solid brick settings, etc., necessitating award to the next lowest bidder at an excess cost to the United States of $5,750.00." Pursuant to this notice of settlement the amount of $5,750 due plaintiff was covered by the defendant into the United States Treasury.

Plaintiff denied that it was indebted to the United States in any amount whatever, and protested the action of the defendant in applying the first partial payment due it under the Pearl Harbor contract against the alleged indebtedness to the United States, and contends that the sum of $5,750 was illegally covered into the United States Treasury.

In December 1933 plaintiff was invited by the Bureau of Yards and Docks, Navy Department, to submit a bid for furnishing all materials and performing all work required for installing complete at the Mare Island Navy Yard two 200-H. P. horizontal water tube boilers, with brick settings, and four combination gas and oil automatic burners and accessories.

On December 30 plaintiff requested the Ray Burner Company of San Francisco, to submit quotations on the price of the four combination gas and oil automatic burners and the cost of installing them. The Ray Burner Company replied early in January, giving the requested quotations, but this letter was not received by plaintiff. On January 9 a second letter was addressed to plaintiff by the Ray Burner Company in which reference was made to the quotation of prices submitted in the previous communication, it being stated:

> Since quoting on the combination gas and oil fully automatic burners to be installed under the above specification * * * We will install the four burners, complete with all the controls, * * * for a net price of $1,850.

Plaintiff, without making further inquiry, assumed the $1,850 quoted to include not only the cost of installation in place but the selling price of the burners as well, and in making its calculations for the composite bid which it submitted to the Government for furnishing and installing the boilers and burners, included an estimate of $1,850 for supplying as well as installing the burners.

Upon the bids being opened on January 16 plaintiff learned that the next lowest bid (that of R. G. Meyler Corporation) was $5,750 more than its own, and in casting about to ascertain the reason for the extreme disparity between the two bids, discovered that it had misunderstood the quotations submitted to it by the Ray Burner Company, its subcontractor.

The bid submitted to the Navy Department by plaintiff contained the condition that it would not be withdrawn within sixty days, and plaintiff agreed further that if accepted within that period it would furnish the supplies, services, or work at the prices stated. The bond furnished by plaintiff at the time of submitting bid contained the obligation that plaintiff would, if the bid was accepted within sixty days, enter into a contract and furnish a performance bond, and on failure or refusal so to do, or if the bid be withdrawn, plaintiff obligated itself to pay the Government all excess cost incurred by it in having the work performed by others.

Before the bid was accepted, plaintiff wrote the Navy Department calling attention to its misinterpretation or misunderstanding of the price quotations of its subcontractor, and requested permission to withdraw its bid. Permission to withdraw was refused and the Navy Department, within the sixty days agreed upon, accepted plaintiff's bid.

After acceptance plaintiff sought to reach a settlement with the Ray Burner Company concerning the price of the oil burners and the cost of installing the same, but the subcontractor refused to make any reduction in the price and cost it had quoted in its previous letters addressed to the plaintiff, the first of which had not been received.

Thereafter plaintiff refused either to enter into a contract with the Navy Department or to furnish the material and perform the work covered by the bid. The Navy Department thereupon accepted the bid of R. G. Meyler Corpora-

tion, the next lowest bidder, at a bid price of $31,700, which was $5,750 in excess of plaintiff's bid.

The General Accounting Office, on October 7, 1934, sent notice to plaintiff demanding that it reimburse the Government for the excess cost in the sum of $5,750. Plaintiff refused to remit said sum or any part thereof.

There can be no doubt that plaintiff's bid on the Mare Island project was based on a mistake. The bid was based on an estimate furnished by plaintiff's subcontractor and included $1,850 as the cost of the oil burners and their installation, when in truth and in fact the sum of $1,850 covered only the work of installation of the burners and did not include their cost which had previously been quoted to plaintiff by the subcontractor at $5,650 in a letter which plaintiff had not received. The error of $5,650 was so large that it would be unreasonable to suppose that plaintiff would have made the bid it did had it not believed that the cost price of the burners was included in the estimate submitted by the subcontractor.

Even if the plaintiff had not expressly called the error in the bid to the defendant's attention prior to its acceptance, the defendant should have suspected the existence of the mistake. Three bidders other than plaintiff submitted bids. These bids ranged from $25,950 submitted by plaintiff, to $31,700, $32,600, and $33,978 submitted, respectively, by the other three. When it is considered that three out of the four bids made fall within a range of $2,300 on a $32,000 job, and the fourth bid submitted is $5,750 lower than the lowest bid of the other three bids, the conclusion is obvious that the low bidder must have made an error in his computation.

Upon the facts shown we are of the opinion that plaintiff should have been permitted by the defendant to withdraw its bid without penalty, and because of such permission being refused by the defendant plaintiff was justified in its refusal to sign the contract, or to perform the work, or furnish the material contemplated in its bid. The prevailing rule is well stated in 3 McQuillan on Municipal Corporations (2nd ed.), Section 1337, as follows:

> If there is an honest mistake in the bid on the part of the contractor, due to clerical errors, not intended to mislead the municipality or any other bidder, and the

> errors were known to the municipal officers before the contract was awarded, a bidder refusing to accept the contract who is sued for the difference between the price of his bid and the sum paid by the municipality for carrying out the contract may set up the error as a defense. So if there is a mistake in the bid, and the bidder calls attention thereto promptly, he will not be bound by the bid, although the statutes provide that no bid can be withdrawn until after a contract has been let and executed for which the bid was made.

In *Moffett, Hodgkins & Co.* v. *Rochester*, 178 U. S. 373, plaintiff in submitting proposals for the performance of certain work in connection with the improvement of the waterworks system in the city of Rochester made errors whereby the compensation it would receive for the work would be greatly reduced if the proposal was accepted and the work performed. These errors were known to the city authorities before action was taken by them on the proposals. The statutes of New York provide that "neither the principal nor sureties on any bid or bond shall have the right to withdraw or cancel the same until the board shall have let the contract for which such bid is made and the same shall have been duly executed." The city government accepted plaintiff's bid on this particular contract and thereafter plaintiff declined to enter into the contract for the performance of the work at the price bid. The Supreme Court, in passing on the case, said:

> There was no doubt of the mistake, and there was a prompt declaration of it as soon as it was discovered and before the city had done anything to alter its condition. Indeed, according to the testimony of one witness, the clerk of the board before the mistake was declared by complainant's engineer expressed the thought that fifty cents per cubic yard for earth excavation was too low, "and there was some discussion about it at the time, but Mr. Aldridge (he was chairman of the board) said he (the clerk) might as well go on and read it, as the bid was informal." The reading proceeded, and subsequently the board let the work on contract No. 1 to Jones & Son, and accepted complainant's proposals containing the mistakes for the work on line "B," contract No. 2, although complainant protested that there was a mistake in the price of earth excavation and also in tunnel excavation.

Opinion of the Court

This was inequitable, even though it was impelled by what was supposed to be the commands of the charter. It offered or forced complainant the alternative of taking the contract at an unremunerative price, or the payment of $90,000 as liquidated damages. We do not think such course was the command of the statute or the board's duty.

The rule between individuals is that until a proposal be accepted it may be withdrawn, and if this principle cannot be applied in the pending case, on account of the charter of the city, there is certainly nothing in the charter which forbids or excuses the existence of the necessary elements of a contract.

The charter of the city provides that "neither the principal nor sureties on any bid or bond shall have the right to withdraw or cancel the same until the board shall have let the contract for which such bid is made, and the same shall be duly executed." A perfectly proper provision, but as was said by the learned Circuit Court:

"The complainant is not endeavoring 'to withdraw or cancel a bid or bond.' The bill proceeds upon the theory that the bid upon which the defendants acted was not the complainant's bid; that the complainant was no more responsible for it than if it had been the result of agraphia or the mistake of a copyist or printer. In other words, that the proposal read at the meeting of the board was one which the complainant never intended to make, and that the minds of the parties never met upon a contract based thereon. If the defendants are correct in their contention there is absolutely no redress for a bidder for public work, no matter how aggravated or palpable his blunder. The moment his proposal is opened by the executive board he is held as in a grasp of steel. There is no remedy, no escape. If, through an error of his clerk, he has agreed to do work worth a million dollars for ten dollars, he must be held to the strict letter of his contract, while equity stands by with folded hands and sees him driven to bankruptcy. The defendant's position admits of no compromise, no exception, no middle ground."

These remarks are so apposite and just it is difficult to add to them. The transactions had not reached the degree of a contract—a proposal and acceptance. Nor was the bid withdrawn or cancelled against the provision of the charter. A clerical error was discovered in it and declared, and no question of the error was then made or of the good faith of complainant.

The American Law Institute in Restatement of the Law of Contracts, Vol. II, Sec. 503, page 967, interprets the applicable law as follows:

> 1. A, in answer to an advertisement of B for bids for the construction of a building according to stated specifications, sends B a bid of $50,000. B accepts the bid. A, in the calculations that he makes prior to submitting his bid, fails to take into account an item of construction that will cost $5,000. If B knows, or because of the amount of the bid or otherwise, has reason to know that A is acting under a mistake, the contract is voidable by A; otherwise not.

The same rule is laid down in Williston on Contracts (Rev. ed., Williston and Thompson, 1937), Section 1578:

> * * * Rescission has been most frequently sought where a price was bid which because of erroneous arithmetical processes or by the omission of items was based on a mistake. Relief has been allowed in several cases of this and other kinds, though denied in others. In some of them, at least, it would seem that the party not in error should have suspected the existence of a mistake, in which case clearly rescission and restitution should be allowed.

Plaintiff had the undoubted right to withdraw its bid on the Mare Island project, and having had this right it necessarily follows that plaintiff cannot be penalized because of its refusal to sign the contract, or to perform the work or furnish the material contemplated by the bid. Plaintiff therefore was not indebted to the United States in the sum of $5,750, withheld by the Comptroller General from moneys admittedly due it on the Pearl Harbor contract, and the amount was illegally withheld.

Plaintiff is entitled to recover the amount so withheld and is hereby awarded judgment in the sum of $5,750. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

CHARLES G. WADBROOK v. THE UNITED STATES

[No. 43580. Decided February 5, 1940]

On the Proofs

Pay and allowances; effective date of retirement.—Decided upon the authority of *Greenwald* v. *United States*, 88 C. Cls. 264, 267.

The Reporter's statement of the case:

King & King for the plaintiff. *Mr. Fred W. Shields* and *Mr. John W. Gaskins* were on the brief.

Mr. L. R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff, a first lieutenant in the Marine Corps, sues to recover increased active duty pay and allowances due by reason of length of service for the period from May 27 to July 1, 1936, the date on which his retirement was made effective by order of the President, and also the increased retired pay thereafter accruing to him on account of length of service to July 1, 1936.

The court made special findings of fact, as follows:

1. On June 3, 1926, plaintiff was appointed a second lieutenant in the United States Marine Corps. On May 5, 1932, he was promoted to first lieutenant, and served continuously on active duty until July 1, 1936, when he was placed on the retired list on account of incapacity due to an incident of the service.

2. April 13, 1936, plaintiff appeared before a naval retiring board which found that he was incapacitated for further active service by reason of psychoneurosis neurasthenia, and that his incapacity was permanent and the result of an incident of the service.

3. May 26, 1936, the Acting Secretary of the Navy forwarded the findings of the retiring board to the President with recommendation that they be approved and that, on July 1, 1936, plaintiff be retired from active service and

placed on the retired list in conformity with the provisions of the United States Code, Title 34, Section 417.

4. May 27, 1936, the President approved the findings of the retiring board and the recommendation of the Secretary of the Navy.

5. June 2, 1936, the Major General Commandant, United States Marine Corps, advised plaintiff as follows:

> 1. The Naval Retiring Board, Marine Barracks, Norfolk Navy Yard, Portsmouth, Va., before which you appeared on 13 April 1936, found you incapacitated for active service and that your incapacity is permanent and the result of an incident of the service.
>
> 2. The President of the United States, on 27 May 1936, approved the finding of the board and directed that you be retired from active service and placed on the retired list, in conformity with the provisions of U. S. Code, Title 34, Section 417, on 1 July 1936.
>
> 3. Accordingly, you will be transferred to the retired list of officers of the Marine Corps on 1 July 1936, with the rank of First Lieutenant.

6. June 2, 1936, plaintiff completed 10 years of service for pay purposes and, on July 1, 1936, he was credited with 10 years and 28 days of service for pay purposes.

7. If it is held that plaintiff was transferred to the retired list on July 1, 1936, he is entitled to the difference between the active duty pay and allowances of a first lieutenant with more than 10 years' service and that of a first lieutenant with more than 9 but less than 10 years' service from June 3, 1936, to June 30, 1936, amounting to $54.44, and to the difference between the retired pay of a first lieutenant with more than 10 years' service and that of a first lieutenant with more than 9 but less than 10 years' service from July 1, 1936, to March 31, 1938, amounting to $603.75, as computed by the General Accounting Office. However, the claim is a continuing one.

The court decided that the plaintiff was entitled to recover.

OPINION PER CURIAM: On May 26, 1936, the Secretary of the Navy forwarded to the President the findings of the retiring board and recommended that plaintiff be retired effective July 1, 1936. On May 27 the President approved the

findings of the board and the recommendation of the Secretary of the Navy, and directed that plaintiff be retired on July 1, 1936. This was done. Upon these facts plaintiff is entitled to recover under the authority of *James A. Greenwald, Jr.*, v. *United States*, 88 C. Cls. 264, 267. In that case the court held that "The act [sections 1452–1453, R. S.] does not give to an officer the right of retirement but places within the discretion of the President whether or not an officer should be retired for permanent incapacity and when he should be retired." See, also, *Holland* v. *United States*, 83 C. Cls. 375.

Judgment will be entered in favor of plaintiff for active duty pay and allowances from May 27 to July 1, 1936, and increased retired pay of an officer of his rank with more than ten years of service from July 1, 1936, to date of judgment upon the filing of a report from the General Accounting Office showing the amounts due for these periods. It is so ordered.

On May 6, 1940, on report from the General Accounting Office, judgment was entered in the sum of $1,295.48.

LOUISE S. ROOS v. THE UNITED STATES

[No. 43616. Decided February 5, 1940]

On the Proofs

Income tax; filing of waiver before final determination.—Where plaintiff executed and filed with the Commissioner of Internal Revenue a written waiver of restrictions on the Commissioner respecting assessment and collection of deficiency of 1927 income tax, it is held that under the provisions of section 274 (j) of the Revenue Act of 1926 such waiver stopped the running of interest on deficiency 30 days after filing, notwithstanding such waiver was filed before the Commissioner made final determination respecting tax liability, and that plaintiff included waiver of right to appeal to the Board of Tax Appeals.

Same; right to file waiver at any time.—Under section 274 (d) of the Revenue Act of 1926, taxpayer had the right at any time to waive the restrictions on assessment and collection provided in subdivision (a) of section 274 with respect to the whole or any part of a deficiency.

Reporter's Statement of the Case

Same; right of appeal may be waived.—Notwithstanding absence of any provision therefor in the statute, taxpayer's right of appeal to the Board of Tax Appeals may be waived.

Same.—A person may waive any provision of a statute intended for his benefit.

Same; waiver of statute for benefit of Government.—Neither a taxpayer nor an agent of the Government can waive a statutory provision intended for the benefit of the Government, without express authority of law.

Same; appeal after notice of increased deficiency.—Where plaintiff appealed to the Board of Tax Appeals after the Commissioner had mailed a notice of deficiency which was in excess of the amount of the deficiency with respect to which plaintiff had waived the restrictions on assessment and collection, this did not preclude stopping of interest on deficiency by such waiver.

The Reporter's statement of the case:

Mr. Samuel H. Horne for the plaintiff. *Hopkins, Sutter, Halls & DeWolfe* and *Livingston & Livingston* were on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

Plaintiff seeks judgment for $4,350.06, with interest, alleged to have been erroneously and illegally collected as interest on $18,447.91 of a deficiency in income tax for 1927 from January 26, 1930, to October 22, 1933.

Plaintiff contends that this interest was not collectible for the reason that on December 26, 1929, she filed a notice under authority of section 274 (d) of the Revenue Act of 1926 waiving the restrictions mentioned in section 274 (a) on the Commissioner of Internal Revenue with reference to assessment and collection of $18,447.91 as a deficiency for 1927. The Commissioner refused to refund the interest so collected on the ground that the waiver, having been filed before a deficiency notice had been mailed under section 274 (a), did not operate to stop the running of interest at a date prior to the date of assessment.

The court, having made the foregoing introductory statement, entered special findings of fact, as follows:

1. Plaintiff is a citizen and resident of Hillsborough, California. March 15, 1928, she filed her return of income tax for 1927 and paid the tax shown thereon to be due.

2. Shortly prior to November 1929, an internal revenue agent employed in the office of the internal revenue agent in charge at San Francisco examined and audited plaintiff's 1927 return. On November 14, 1929, the internal revenue agent in charge at San Francisco mailed to plaintiff, and plaintiff received, a letter transmitting the report of the revenue agent respecting the examination and audit of her 1927 return. The report set forth adjustments made by the agent and asserted that there was a deficiency in tax of $18,447.91. In this letter the internal revenue agent in charge transmitted a printed form with the name, dates, amount, and address typed in as follows—

Form 870
Treasury Department
Internal Revenue Service
(Revised June, 1928)

Louise S. Roos, San Francisco, Calif.

Waiver of Right to File a Petition with the United States Board of Tax Appeals

The undersigned taxpayer hereby waives the right to file a petition with the United States Board of Tax Appeals under Section 274 (a) of the Revenue Act of 1926, and consents to the assessment and collection of a deficiency in tax for the year or years 1927 aggregating $18,447.91, as indicated in the statement of the Internal Revenue Agent in Charge at San Francisco, Calif., dated Nov. 14, 1929.

(Name)

(Address)

NOTE.—This waiver does not extend the statute of limitations for refund or assessment of tax, and is not an agreement as provided under Section 606 of the Revenue Act of 1928, but its execution and filing at the address shown in the accompanying letter will expedite the adjustment of your income tax liability as indicated above.

and invited plaintiff to sign this form and forward it to the office of the internal revenue agent in charge.

Reporter's Statement of the Case

3. The letter of the agent in charge stated that "Interest is payable on deficiencies found due as set forth on the attached Form 882." The letter further stated that "If a deficiency is indicated no remittance should be made until you receive notice of assessment from the Collector of Internal Revenue for your district."

4. There was also enclosed and transmitted in the letter of November 14. 1929, a printed notice, known and described as Form 882, as follows:

Form 882
Treasury Department
Internal Revenue Service
(Revised Dec. 1928)

NOTICE

Interest at the rate of 6 per centum per annum computed as follows is due on all deficiencies in tax and will be included in notice and demand for payment:

For the years 1909 to 1920, inclusive, from February 26, 1926 (date of passage of the 1926 Act), to the date of assessment, or in case of a waiver under Section 274(d) of the 1926 Act, to the thirtieth day after the filing of such a waiver, whichever is the earlier.

For the years 1921 to 1924, inclusive, from the date prescribed for payment (or, if the tax is paid in installments, upon the part of the deficiency prorated to each installment) to the date of assessment, or, in case of a waiver under Section 274(d) of the 1926 Act, to the thirtieth day after the filing of such a waiver, whichever is the earlier.

For 1925 and subsequent years, from the date prescribed for the payment of the first installment to the date the deficiency is assessed, or, in case of a waiver under Sections 274(d) of the 1926 Act or 272(d) of the 1928 Act, to the thirtieth day after the filing of such waiver, whichever is the earlier.

The inclosed agreement when signed by you will constitute a waiver and will, if filed promptly, operate to curtail the amount of interest you will be obliged to pay since the interest period will terminate thirty days after filing, while without the waiver, assessment must be delayed sixty days from date of deficiency letter.

The "inclosed agreement" referred to in this Form 882 notice was the Form 870 under section 274 (d) waiver above set forth.

5. At all times material hereto the office of the internal revenue agent in charge at San Francisco was a part of the Bureau of Internal Revenue of the United States Treasury Department, the administrative head of which Bureau is the Commissioner of Internal Revenue; it was a part of the official duties of the revenue agent to examine and audit income-tax returns of taxpayers residing in San Francisco and vicinity and to prepare reports of his examinations and audits, and in such reports to set forth his recommendations relating to the tax liability of such taxpayers for the taxable years involved and the amount of any deficiency or overpayment indicated by such examinations. It was the duty and practice of the internal revenue agent in charge, pursuant to instructions of the Commissioner of Internal Revenue, to transmit to the taxpayer a copy of the revenue agent's report on the examination and audit of his income tax return. The letter to plaintiff of November 14, 1929, was on the form prescribed and supplied for such purpose by the Commissioner. At all times material hereto, in any case where the agent's report showed a deficiency, it was the duty and practice of the internal revenue agent in charge, pursuant to the instructions of the Commissioner of Internal Revenue, to transmit with the agent's report a Form 870 waiver as to assessment and a Form 882 explanatory statement regarding interest. The Form 870 waiver and the Form 882 statement transmitted to plaintiff as hereinabove described were the forms prescribed and supplied for such purpose by the Commissioner of Internal Revenue.

6. At all times material hereto internal revenue agents in charge were instructed by the Commissioner that, in any case where the agent's report showed a deficiency in tax, the taxpayer should be requested to sign a Form 870 waiver consenting to immediate assessment and collection of the proposed deficiency and waiving the right to file a petition with the United States Board of Tax Appeals for redetermination; and the agents were further instructed to forward the

executed Form 870 waiver to the Commissioner together with the report of the examining revenue agent.

7. Plaintiff desired to agree to the deficiency so asserted in the revenue agent's report and to stop the accumulation of interest thereon. Pursuant to and in reliance on the letter of November 14, 1929, the revenue agent's report, and said notice Form 882 enclosed therewith, plaintiff, on December 24, 1929, executed said Form 870 waiver authorizing the Commissioner to make immediate assessment and collection of the additional tax or deficiency in the amount of $18,447.91, as so determined in the revenue agent's report; and plaintiff transmitted the Form 870 waiver to the internal revenue agent in charge in San Francisco, California.

8. The executed Form 870 waiver was received by the internal revenue agent in charge on December 27, 1929. It was thereafter forwarded by said agent to the Commissioner of Internal Revenue at Washington, D. C., was received on January 8, 1930, and has since remained in the custody of the Commissioner.

9. Thereafter, no communication with respect to the subject matter was sent to plaintiff by the Bureau of Internal Revenue, or any official, employee, or representative thereof until March 9, 1932. On that date the Commissioner, having made a final determination in respect of plaintiff's tax liability for 1927, as he was required by statute to do, mailed to plaintiff a statutory deficiency notice or a sixty-day letter showing a deficiency in plaintiff's income tax for 1927 in the amount of $23,432.01.

10. On May 4, 1932, plaintiff filed her petition for redetermination with the United States Board of Tax Appeals. Thereafter, on September 22, 1933, pursuant to stipulation between the plaintiff and the Commissioner, the correct deficiency was determined to be $19,447.10. The Board accordingly determined a deficiency for 1927 in that amount.

11. November 18, 1933, there was assessed against plaintiff by the Commissioner a deficiency in income tax of $19,447.40, together with deficiency interest thereon of $6,537.26 computed at the rate of 6 per cent per annum from March 15, 1928, the due date of the tax for 1927, to October 22, 1933.

The collector for the First District of California demanded payment of the amounts assessed. On December 9, 1933, he satisfied $102.25 thereof by application of a credit of an overpayment for another year in that amount. On December 15, 1933, pursuant to the aforesaid demand, plaintiff paid $21,-743.76 in cash. This amount was made up of $19,345.15, being the balance of the deficiency of tax ($19,447.40 minus the credit of $102.25); and of $2,398.61, being interest due at the rate of 6 per cent per annum on $18,447.91 from March 15, 1928, to a date thirty days after the filing of the above-mentioned Form 870 waiver, plus interest due at said rate on $999.49 ($19,447.40 minus $18,447.91) from March 15, 1928, to October 22, 1933. This was all the interest due if the Form 870 was valid at the time filed.

12. Thereafter, on October 5, 1934, pursuant to demand by the collector, plaintiff paid $4,546.54 in cash. This amount was made up of $4,138.65 demanded by him as assessed interest on $18,477.91 of the total deficiency from January 26, 1930, to October 22, 1933, and of $407.89 demanded by him as delinquency interest at 12 per cent per annum for failure to pay when first demanded.

13. September 16, 1936, plaintiff filed a claim for refund of interest of $4,546.54. The claim alleged that under the provisions of section 274 (j) of the Revenue Act of 1926 interest upon the amount specified in the Form 870 waiver should have been collected only from the date prescribed for payment of the tax to the thirtieth day after the filing of the waiver. Plaintiff claimed therein a refund of $4,138.65 collected as interest on the deficiency and $407.89 collected as 12 per cent delinquency interest. The Commissioner rejected the claim in its entirety on February 8, 1937.

14. October 15, 1938, plaintiff filed a claim for refund alleging that under the provisions of section 821 of the Revenue Act of 1938 she was entitled to a refund of $203.94, being one-half of the 12 per cent delinquency interest of $407.89. The Commissioner has allowed this claim for $196.48 which has been refunded, leaving a balance unrefunded of $211.41 as delinquent interest collected on the delayed payment of the questioned interest of $4,138.65.

Opinion of the Court

15. If under the provisions of the applicable revenue acts interest on $18,447.91, the deficiency specified in the Form 870 waiver, should have been collected only from the date prescribed for payment of the tax to the thirtieth day after the filing of said waiver, then plaintiff is entitled to judgment for $4,350.06, together with interest on that amount from October 5, 1934.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The question in this case is whether the notice on Treasury Form 870 executed and filed by plaintiff under and pursuant to the provisions of subdivision (d) of section 274 of the Revenue Act of 1926 prior to the date on which the Commissioner of Internal Revenue made a final determination in respect to plaintiff's tax liability for 1927, and mailed notice of such determination to the taxpayer, operated to stop the running of interest under the provisions of section 274 (j) of the Revenue Act of 1926 on the amount of $18,447.91 as a deficiency for 1927 on a date thirty days after the filing. The Commissioner held that a waiver filed under section 274 (d) could not operate to stop the running of interest unless filed after he had made a final determination of the tax liability and mailed a deficiency notice under the provisions of section 274 (a) of the 1926 Act (44 Stat. 9). This conclusion of the Commissioner was based on the decision in *Standard Portland Cement Co., et al.* v. *United States*, 80 Fed. (2d) 585.

We are of opinion from a consideration of the various provisions of the Revenue Acts of 1924 and 1926, hereinafter discussed, and the provision of section 274 (d) of the Revenue Act of 1926 granting a taxpayer the right *at any time* to file a waiver, such as the one involved in this proceeding, that the decision of the Commissioner was incorrect and that plaintiff is entitled to recover the total amount of interest collected on $18,447.91 for the period commencing thirty days after the filing by plaintiff of the waiver mentioned under section 274 (d) of the Revenue Act of 1926. The waiver in question was a blank form prepared by the Treas-

ury Department, and was designated Form 870. It was entitled "Waiver of Right to File a Petition with the United States Board of Tax Appeals," and was as follows:

> The undersigned taxpayer hereby waives the right to file a petition with the United States Board of Tax Appeals under Section 274 (a) of the Revenue Act of 1926, and consents to the assessment and collection of a deficiency in tax for the year or years 1927 aggregating $18,447.91, as indicated in the statement of the Internal Revenue Agent in Charge at San Francisco, Calif., dated Nov. 14, 1929.

At the bottom of this waiver was a notation stating that "This waiver does not extend the statute of limitations for refund or assessment of tax, and is not an agreement as provided under Section 606 of the Revenue Act of 1928, * * *." This notice was not required to be accepted or signed by the Commissioner in order to become effective.

The Revenue Act of 1924 (43 Stat. 253), in section 900 created the United States Board of Tax Appeals and conferred upon it jurisdiction to review determinations of deficiencies by the Commissioner of Internal Revenue. Section 273 of that act defined a deficiency and section 274 (a) provided that if the Commissioner should determine a deficiency the taxpayer should be notified thereof by registered mail, and that the taxpayer should have sixty days after the mailing of such notice within which he might, if he so desired, file an appeal with the Board of Tax Appeals. The section further provided that the Commissioner should not assess the deficiency, or any part thereof, until after the expiration of the sixty days following the mailing of the deficiency notice and that the tax should then be assessed if the taxpayer did not file an appeal to the Board, but that if an appeal should be filed with the Board within the sixty-day period the deficiency should not be assessed until the Board had entered its decision in the case. These provisions requiring that assessment and collection be withheld were intended solely for the taxpayer's benefit.

Subdivision (f) of section 274 of the Revenue Act of 1924 imposed interest at 6 percent per annum on the amount determined by the Commissioner or by the Board of Tax

Opinion of the Court

Appeals as a deficiency from the date on which the original tax or installments for the year involved became due to the date on which the deficiency was assessed. Prior to the enactment of this act, deficiencies in tax did not bear interest unless they remained unpaid for more than ten days after notice and demand for payment thereof by the collector. The 1924 Act contained no express provision for the stopping of interest on the deficiency through a waiver by the taxpayer of the provisions of section 274 requiring the Commissioner to withhold assessment and collection except in the case of a jeopardy assessment until a deficiency notice had been mailed and for sixty days thereafter, or, if an appeal was filed with the Board, until the Board had entered its decision. Of course, under the 1924 Act, as under all revenue acts, a taxpayer might at any time pay any tax which he believed to be due the Government, but under the provisions of the statutes he was not required to do so until after the Commissioner had made a determination thereof and the taxpayer had been given an opportunity to be heard thereon. However, as pointed out in *Lehigh Portland Cement Co.* v. *United States*, decided December 4, 1939, *ante*, p. 36, the Board of Tax Appeals held under the 1924 Act that the term "deficiency," as defined in section 273, did not include an additional tax which had been paid by the taxpayer either before or after the Commissioner had mailed a deficiency notice and that if the Commissioner determined a deficiency and mailed a notice thereof, the payment of the deficiency before or after the taxpayer filed an appeal with the Board deprived the Board of jurisdiction to the extent of such payment inasmuch as the Board did not under that act have jurisdiction to determine overpayments. Section 277 (b) of the Revenue Act of 1924 provided that the period for assessment of a deficiency should be extended by sixty days if a notice of such deficiency was mailed by the Commissioner under section 274 (a) and no appeal was filed with the Board, or, if an appeal was filed with the Board, the limitation period on assessment should then be extended by the number of days between the date of mailing of the deficiency notice and the date of final decision by the Board.

Section 274 (a) of the Revenue Act of 1926, approved February 26, 1926, was, so far as material here, the same as

the Revenue Act of 1924, except it provided that the whole or a part of an amount defined as a deficiency by section 273 might be assessed and collected before the time specified if the taxpayer concerned filed with the Commissioner, under subdivision (d) of section 274, a signed notice in writing waiving the restrictions provided in subdivision (a) with reference to the withholding by the Commissioner of assessment and collection of the whole or any part of a deficiency. The exact language of subdivision (d) is as follows: "The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subdivision (a) of this section on the assessment and collection of the whole or any part of the deficiency." The 1926 Act also gave the Board jurisdiction to determine in any case whether or not the taxpayer had, either before or after the deficiency notice was mailed, overpaid the tax due for any year in respect of which the Commissioner determined a deficiency within the meaning of section 273. Section 277 (b), Revenue Act of 1926, reenacted and continued the provision of the Revenue Act of 1924 with reference to the suspension of the period of limitation on assessment and collection of the whole or a part of an amount constituting a deficiency as originally enacted in the Revenue Act of 1924 with certain modifications not material here. Subdivision (j) of section 274 of the 1926 Act reenacted the provision of the 1924 Act requiring the collection of interest on a deficiency and specified that such interest should be collected from the date prescribed for the payment of the original tax or, if paid in installments, from the date prescribed from the date of the first installment to the date the deficiency should be assessed, "or, in the case of a waiver under subdivision (d) of this section, to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier." This language shows that it was contemplated that the waiver might be filed before a determination of the correct tax liability by the Commissioner. The Revenue Act of 1926, as it passed the House of Representatives, did not contain subdivision (d) of section 274 or the above-mentioned portion of subdivision (f). These provisions were recommended by the Senate Finance Committee and accepted. In

explaining these provisions, the Senate Finance Committee in its Report No. 52, 69th Congress, 1st sess., 1926, at page 27 stated:

> The law provides that where a deficiency is assessed there shall be assessed at the same time interest at the rate of 6 percent from the time the deficiency should have been paid to the date of assessment. In order to permit the taxpayer to pay the tax and stop the running of interest, the committee recommends in section 274 (d) of the bill that the taxpayer at any time be permitted to waive in writing the restrictions on the commissioner against assessing and collecting the tax, but without taking away the right of the taxpayer to take the case to the board. It is provided in such cases that the 6 percent interest stops running on the thirtieth day after the filing of such waiver unless assessment is made before such time.

From what has been shown above we think it is clear that the execution of and the filing with the Commissioner by plaintiff of the signed notice in writing stopped the running of interest on the amount of $18,447.91 of the deficiency for 1927 thirty days after the filing of such notice, and that the notice was valid and effective for that purpose, notwithstanding the fact that it was filed prior to the date on which the Commissioner made his final determination with respect to plaintiff's tax liability for 1927 and mailed notice to plaintiff by registered mail disclosing the result of his determination. The fact that plaintiff included in the notice a provision that she also waived the right to appeal to the Board of Tax Appeals from a determination by the Commissioner of a deficiency for that year, to the extent of $18,447.91, did not affect the validity or legality of the waiver. Nor do we think the notice had the effect of changing or modifying any provision of the statute, except those provisions of section 274 to the effect that the Commissioner should withhold assessment and collection until 60 days after the deficiency notice had been mailed or, if an appeal was filed, until the decision of the Board became final. Section 274 (d) is so clear as to leave no room for doubt that plaintiff had the right *at any time* to waive the restrictions on assessment and collection provided in subdivision (a) of

section 274 with respect to the whole or any part of a deficiency; and that the provision of subdivision (j) of section 274, that, if the taxpayer does so, interest on the amount with respect to which the restrictions are waived shall be assessed and collected only to the thirtieth day after the filing of such waiver or to the date the amount is assessed, whichever is the earlier, is equally clear. Provision for the filing of a written notice waiving the restrictions mentioned was never intended, as is shown by a consideration of other provisions of the statute, to affect in any way the right or duty of the Commissioner to proceed, as provided by the statute, to determine the correct tax liability for the taxable year involved and to mail a notice to the taxpayer setting forth the result of such determination. And, as shown by the report of the Senate Finance Committee quoted above, it was never intended that a taxpayer by waiving the restrictions on assessment and collection should lose the right of appeal to the Board of Tax Appeals. On the contrary, the committee specifically pointed out that the purpose of subdivision (d) was to permit the taxpayer to pay a deficiency in whole or in part without losing the right of taking the case to the Board of Tax Appeals whenever the Commissioner should render his final determination. If it had been intended that a taxpayer could not effectively waive the restrictions on assessments and collection before the Commissioner had made his final determination and mailed a deficiency notice, we think Congress would have used language sufficiently clear to disclose that purpose rather than stating specifically that the taxpayer might have that right at any time. *Cleveland Railway Co.* v. *Moore*, 108 Fed. (2d) 656, decided by the Sixth Circuit January 11, 1940.

Of course that portion of the waiver filed by plaintiff which waived the right to appeal to the Board of Tax Appeals did not become operative until the Commissioner had mailed the deficiency notice, because her right to appeal did not accrue until then. Its inclusion in the waiver of restrictions on assessment and collection did not affect in any way the validity or legality of the waiver as terminating the right of the Commissioner to assess and collect interest for a period subsequent to a date thirty days after filing of the

waiver. Although there is no provision in the statute with reference to the filing by a taxpayer of a waiver of the right to appeal to the Board of Tax Appeals, such right may be waived under the well-established rule that a person may waive any provision of a statute intended for his benefit. *Lehigh Portland Cement Co.* v. *United States*, *supra*. That right may, under general principles of law, be waived in writing or by not taking an appeal to the Board of Tax Appeals, but, in either event, other provisions of the statute with reference to the determination by the Commissioner of a deficiency, the mailing of notice and the suspension of the statute of limitations are not affected unless there is some positive provision of the statute to that effect. Neither a taxpayer nor an agent of the Government can waive a statutory provision intended for the benefit of the Government without express authority of law.

The fact that plaintiff appealed to the Board of Tax Appeals for 1927 after the Commissioner had mailed a deficiency notice in which he determined a deficiency of $23,432.01 for 1927 which was in excess of the amount of the deficiency with respect to which plaintiff had waived the restrictions on assessment and collection does not affect the question here involved. As above stated, the waiver by plaintiff of the restrictions mentioned in section 274 (a) on assessment and collection of the amount specified in the waiver was effective and was independent of the waiver of her right to appeal to the Board of Tax Appeals as to such amount. When the Commissioner, in his final determination, subsequently determined that there was a deficiency in excess of the amount mentioned in the waiver, the taxpayer had the right to take the case to the Board of Tax Appeals or to pay the tax and bring suit to recover in whole or in part.

Judgment will be entered in favor of plaintiff for $4,350.06 with interest at 6 percent per annum from October 5, 1934, to a date not more than 30 days preceding the refund check as may be determined by the Commissioner of Internal Revenue. It is so ordered.

WHITAKER, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

CONSOLIDATED AIRCRAFT CORPORATION v. THE UNITED STATES

[No. 43823. Decided February 5, 1940]

On the Proofs

Social Security taxes not taxes on "material," "articles," or "supplies."—Decided upon the authority of *United States* v. *The Glenn L. Martin Company*, 308 U. S. 62, in which it was held by the Supreme Court that Social Security taxes paid in connection with the production of the articles called for under a contract were not taxes "applicable to the material" called for under said contract.

Same; letter written after execution of contract.—Where letter of the Secretary of the Navy to the Comptroller General stated that the Government was chargeable under the contract with the Social Security taxes, it is held that such letter, written more than 3 years after the execution of the first contract and more than a year after the execution of the last contract, is not evidence of the construction placed upon the contracts at the time they were entered into.

The Reporter's statement of the case:

Mr. Herman J. Galloway for the plaintiff. *King & King* were on the brief.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact, as follows:

1. The plaintiff, a corporation organized under the laws of the State of Delaware, entered into four contracts with the defendant, through the Navy Department, for the furnishing of airplanes, parts, and accessories. Said contracts were numbered and dated, respectively, as follows:

Contract No.:	Date
NOs-31792	June 13, 1933
NSs-34346	January 18, 1934
NOs-35645	April 17, 1934
NOs-43087	June 29, 1935

Each of said contracts contained the following clause, or its equivalent:

> Prices bid herein include any Federal tax heretofore imposed by the Congress which is applicable to the material on this contract. Any sales tax, duties, imposts, revenues, excise, or other taxes which may hereafter be imposed by the Congress and made applicable to the material on this contract will be charged to the Government and entered on invoices as a separate item.

2. On August 14, 1935, the President approved an Act of Congress known as the Social Security Act (49 Stat. 620), and on that date the Act became effective.

Portions of each of the above-mentioned contracts were performed after the passage of said Social Security Act, and taxes were imposed by defendant and paid by the plaintiff with respect to the individuals employed by plaintiff in the performance of said contracts as follows:

Contract No.:	Amount
NOs-31792	$83.95
NOs-34346	242.51
NOs-35645	36.39
NOs-43087	54,906.88
Total	55,269.73

3. On October 24, 1936, and December 31, 1936, respectively, plaintiff submitted to the Navy Department separate vouchers for an aggregate amount of $25,603.65 on account of the payment of said Social Security taxes, and later, it submitted a voucher for the balance. In the meantime, on January 26, 1937, the Navy Department forwarded said vouchers and others to the General Accounting Office, stating that the Government was chargeable under the above quoted provision of the contract with the Social Security taxes, and asked direction as to the proper method of computation thereof.

The Acting Comptroller General replied on March 18, 1937, holding that the United States was not chargeable with the Social Security taxes under such contracts, since the Social Security taxes were not taxes made applicable to the material to be furnished under the contract.

4. No part of said sum of $55,269.73 has been paid.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The decision of this case is controlled by the decision of the Supreme Court in *United States* v. *The Glenn L. Martin Company*, decided November 6, 1939. (308 U. S. 62.) The contract under consideration in that case stipulated that the prices charged included all Federal taxes theretofore imposed by Congress which were applicable to the materials called for under the contract, and it was agreed that—

> If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress subsequent to the date of this contract and made applicable directly upon production, manufacture, or sale of the supplies called for herein and are paid by the Contractor on the articles or supplies herein contracted for then the price herein stipulated will be increased or decreased accordingly and any amount due the Contractor as result of such change will be charged to the Government and entered on vouchers as separate items.

Claim for reimbursement of Social Security taxes paid in connection with the production of the articles called for under that contract was made, but was denied by the Supreme Court on the ground that Social Security taxes were not "applicable to the material" called for under the contract.

The Court said:

> The contract refers only to Federal taxes, existing or future, on "material," "articles," or "supplies." And additional compensation is provided to offset only Federal taxes of the type of sales taxes and processing taxes, "applicable directly upon production, manufacture, or sale" and actually paid on supplies delivered to the Government. Since a tax on payrolls, or on the relationship of employment, is not—but in fact is distinct from—the type of tax "on" articles represented by sales taxes and processing taxes, respondent is not entitled to the additional compensation which it seeks.

We see no distinction between the provisions of the two contracts which is material here.

The plaintiff says, however, that the letter of the Secretary of the Navy of February 26, 1937, shows that the parties construed the contract in the case at bar to embrace Social Security taxes. But even if this letter could in any event be treated as evidence of the construction put on the contract by the parties, it is clear that in this case it cannot be. It was written three and one-half years later than the first contract in suit and a year and a half later than the last contract. At most, it is evidence only of the Navy Department's construction of the contracts at the time of the writing of the letter. It is not evidence of the construction placed upon the contracts at the time they were entered into. Moreover, all the contracts, except the last one, were entered into more than a year prior to the passage of the Social Security Act.

For the reasons stated, the petition must be dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WILLIAMS LAND COMPANY v. THE UNITED STATES

[No. 43979. Decided February 5, 1940; opinion modified April 1, 1940]

On the Proofs

Income tax; interest on Government obligations.—The provisions of the income-tax acts of 1932 and 1934 exempting from taxation interest upon "the obligations of a State, Territory, or any political subdivision thereof," did not intend that all promises to pay or enforceable actions should constitute "obligations" within the meaning of that term as used in the exemption clause.

Same.—The liability to make a refund of Federal taxes carrying interest is not an obligation of the United States within the meaning of the exempting section.

Same.—Statutes exempting from taxation "interest upon the obligations of the United States" are designed to aid the borrowing power of the United States Government by making its interest-bearing bonds attractive to investors, and the scope of the term must be narrowed accordingly, and the meaning of the word "obligations," as used in such exempting sections, should not be extended to include interest upon obligations not incurred under the borrowing power. *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 91.

Same; interest on condemnation award not tax exempt.—Interest received on a condemnation award from the date of the taking to the date of payment of the award is not exempt from taxation as interest upon an obligation of a State within the meaning of the exemption provisions of the statutes. *United States Trust Company* v. *Anderson*, 65 Fed. (2d) 575 and *Seaside Improvement Company* v. *Commissioner*, 105 Fed. (2d) 990.

Same.—The obligation of the city of Detroit, in question in the instant case, was not incurred by that municipality under its borrowing power.

Same; interest as just compensation.—Interest upon a condemnation award is payable as a part of just compensation whether or not it is authorized by statute. *Seaboard Air Line* v. *United States*, 261 U. S. 299.

Same.—Under the agreement between the city of Detroit and property owners, including the plaintiff, for extension of time for payment of compensation award in condemnation proceedings, whereby interest on such award at a reduced rate was to run from date of taking to date of payment, such interest was taxable under the rule applied in cases cited.

Same; interest accrued.—Where plaintiff employed the accrual method of accounting for income-tax purposes, and joined in the agreement with city for extension of time of payment of condemnation award and reduction of interest rate, only that portion of the interest which accrued in the particular calendar year was taxable in that year.

Same.—Amounts of interest paid in the tax year 1934 but accrued in prior years, 1932 and 1933, were not taxable in 1934.

The Reporter's statement of the case:

Mr. James A. Cosgrove for the plaintiff. *Mr. Raymond H. Berry*, *Mr. Ralph W. Barbier*, and *Mr. Arthur L. Evely* were on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* where on the brief.

Plaintiff seeks to recover $2,212.67, income tax and interest thereon, alleged to have been erroneously and illegally collected for 1934. The tax and interest sought to be recovered was paid as a result of the inclusion in gross income for 1934 by the defendant of an item of interest of $15,461.83 received by plaintiff and accrued from the City of Detroit as the first installment of interest due on a condemnation award for certain property on Woodward Avenue in the City of Detroit.

Plaintiff claims, first, that this was interest upon an obligation of the City of Detroit, a political subdivision of the State of Michigan and, therefore, exempt from tax under Section 22 (b) (4), Revenue Acts of 1932 and 1934 (47 Stat. 169; 48 Stat. 680); and, second, that on the accrual basis there was no tax for 1934.

The court, having made the foregoing introductory statement, entered special findings of fact, as follows:

1. Plaintiff is a body corporate organized and existing under the laws of the State of Michigan.

2. Plaintiff duly filed income and excess-profits tax returns for the calendar years 1932, 1933, and 1934. Net losses were reflected in these returns and no taxes were paid at the time they were filed.

3. July 2, 1934, plaintiff received $27,838.39 from the City of Detroit on account of a condemnation award (hereinafter more particularly described) in the principal amount of $152,342.33. The amount received represented a ten percent installment payment ($15,234.23) on the principal amount and interest ($12,604.16) on the full amount of the award from July 21, 1932, to July 2, 1934.

4. Plaintiff included as taxable income in its return filed for the calendar year 1934 interest received on the condemnation award in the amount of $3,244.13, covering the period January 1, 1934, to July 2, 1934, and accrued interest on the principal amount of the award for the period July 3, 1934, to December 31, 1934, in the amount of $2,905.56, a total of $6,149.69.

5. January 15, 1936, the Commissioner of Internal Revenue proposed an additional assessment against plaintiff of $2,090.80 for the calendar year 1934. This proposed addi-

tional assessment was arrived at in part by considering that plaintiff was taxable in 1934 on $15,461.83, the total interest paid to plaintiff on July 2, 1934, in the amount of $12,604.16, plus a further amount of interest in the sum of $2,857.67, which became available to plaintiff in December 1934 but which was not actually paid to plaintiff until January 1935. After appropriate assessment, plaintiff paid the additional tax of $2,090.80 plus interest of $121.87, a total of $2,212.67, March 24, 1936.

6. The interest received by plaintiff in 1934 but not reported in its return for that year, in the amount of $9,360.03, was entered on the books of plaintiff when received as an accrual for the years 1932 and 1933, and amended returns were thereupon filed for those years. Those returns as amended reflected net losses for 1932 and 1933 and no taxes were paid for either of those years.

7. July 22, 1937, plaintiff duly filed a claim for refund of $2,212.67, the full amount of the tax and interest paid for 1934 on March 24, 1936, such claim being on the following basis:

> The taxpayer erroneously included in its gross income, for the calendar year 1934, interest in the amount of $6,149.69, received by it during the year 1934 upon an obligation of the City of Detroit, a political subdivision of the State of Michigan.
>
> The Commissioner of Internal Revenue erroneously added to taxpayer's gross income for the calendar year 1934 the amount of $9,312.14, as taxable interest for the calendar year 1934. Said alleged taxable interest in the amount of $9,312.14 is also interest upon an obligation of the City of Detroit, a political subdivision of the State of Michigan.
>
> In the event it should be held that said interest is not exempt from income tax and taxpayer also claims that the Commissioner of Internal Revenue has erroneously included the amount of $9,312.14 in its gross income for 1934, inasmuch as the Commissioner has refused to recognize that the taxpayer keeps its books on the accrual basis and has added to taxpayer's 1934 gross income interest earned in prior years; and, on the other hand, has added to taxpayer's 1934 gross income interest not received during the year 1934, but accrued during that year, thus apparently relying upon the accrual basis.

The Commissioner rejected the claim for refund in its entirety and notified plaintiff of his action by registered letter dated February 28, 1938. No portion of the taxes and interest paid for which refund was claimed has been paid or credited or otherwise refunded to plaintiff.

8. November 10, 1928, plaintiff held title to a certain tract of land fronting on Woodward Avenue in the City of Detroit, Michigan, on which was located stores and apartments which it held and operated as rental property.

9. Prior to 1928 the widening of Woodward Avenue had been under consideration for some time by certain people and groups in the City of Detroit, and two different plans had been suggested. October 6, 1925, the voters of the City of Detroit voted on these two plans and approved one of them, which necessitated taking part of the property held by plaintiff. After that vote a resolution of necessity was passed by the Common Council of Detroit on July 12, 1927. The resolution was conditioned on the Woodward Avenue Improvement Association, of which plaintiff was a member, getting at least 75 percent of the property owners affected by the widening to sign financing agreements before the start of court proceedings to condemn the property. July 13, 1927, the Mayor of Detroit vetoed the resolution, stating in his message that the financial condition of the city was such that the city could not go forward with the widening program.

10. By September 13, 1927, the Woodward Avenue Improvement Association had obtained the signatures of 87 percent of the property owners affected by the proposed widening, and on that date the Common Council passed the resolution over the Mayor's veto.

The financing agreements signed by plaintiff and other property owners were on a printed form drawn up by the corporation counsel of the City of Detroit and attorneys representing the Woodward Avenue Improvement Association. The agreement signed by plaintiff read as follows:

> *Whereas* it is the desire of the City of Detroit and various property owners along Woodward Avenue that said street be widened from the northerly line of Adams

Reporter's Statement of the Case

Avenue north to the southerly line of Grand Boulevard as soon as possible, and the City of Detroit, through its Common Council, has caused condemnation proceedings to be instituted in the Recorder's Court of the City of Detroit for the purpose of said widening (File No. 1610), but the financial condition of the City of Detroit is not such at the present time as to warrant the continuance of said proposed condemnation proceedings and the payment of the awards unless a satisfactory plan for the extension of the time for payment of same is consented to by property owners and other parties in interest.

Therefore be it agreed by and between the parties as follows:

1. Parties of the second part severally agree that in the event of the finding of a verdict of necessity for said improvement by the jury in said condemnation proceeding, and upon final confirmation of the total award for damages in connection with said parcel, the City of Detroit may withhold the payment of said award until the determination of the special assessments to be imposed in connection with the same, and may thereupon deduct from the amount of said award to the second parties interested therein the amount of the special assessments chargeable against said parties of the second part in connection with said condemnation: *Provided, however*, That subject to the limitations contained in paragraph 4 hereof, nothing herein contained shall limit the right of the parties of the second part to contest the necessity of said proposed improvement or to move for a new trial in said condemnation suit or to appeal from the judgment of confirmation, and that nothing herein contained shall affect or impair the right of the parties of the second part to appeal from or take proceedings to contest in any manner provided by law the validity or propriety of any special assessment imposed for any part of the compensation awarded in said condemnation proceeding.

2. Parties of the second part hereto further severally agree to extend the time of payment of their award, or of the balance of their award, which is payable under the provisions of the charter of the City of Detroit within one (1) year from the date of confirmation, into ten (10) equal annual payments, together with interest on the unpaid balance at the rate of four and one-quarter (4¼%) percent per annum, payable annually

from the date of final confirmation of such award. The first payment on the award, or the balance thereof, as the case may be, shall be made within one (1) year from the date of final confirmation, and the remaining installments annually thereafter.

3. Parties of the second part further agree that the City of Detroit may enter upon and take possession of and use said described land and premises for the purpose for which it was taken, and may remove all buildings, fences, and other obstructions at any time therefrom after ninety (90) days after the final confirmation of the award thereon. Second parties will, upon said final confirmation and first payment as provided for above, execute the usual deed of title to said property, subject to the rights of any lessee or lessees, but said judgment or any part thereof shall remain a lien against said property until paid, which lien may be enforced by foreclosure in chancery in the manner provided for foreclosure of mortgages.

4. The benefits of the provisions of Sections 15 and 16 of Chapter 1 of Title 8 of the charter of the City of Detroit, and of all other provisions of law relative to the time of the payment of condemnation awards, or providing for the payment other than annually as herein provided, or other matters conflicting with the foregoing paragraphs, are hereby waived, and second parties expressly agree not to question or contest the validity of this agreement or to assert for their benefit any provision of law which would contemplate the payment of said awards or the withholding of such use and possession of said premises other than as provided herein.

5. The City of Detroit reserves the right to pay said awards on or before the times above agreed to.

6. The City of Detroit agrees that said awards, or any balances owing thereon, shall be at all times considered as tax exempt by first party and that the same shall not be placed upon the assessment rolls of the City of Detroit for tax assessment purposes.

7. This agreement shall, upon final confirmation of the awards in said proceedings, also be construed to be a contract of purchase of the land, property, and improvements described at the price awarded by the condemnation jury, provided nothing herein contained shall in any manner limit or modify the right of the legislative body of the City of Detroit to amend or withdraw the petition, or to move for a new trial, order an appeal or otherwise control said proceedings as authorized by

law. In the event of a withdrawal or dismissal of said proceedings, this contract shall be void.

8. This contract is binding upon the respective heirs, assigns, successors, or personal representatives of the parties hereto.

11. Condemnation proceedings were thereupon instituted in the Recorder's Court for Wayne County, Michigan, in November 1927, looking to the condemnation of certain property, including a strip of plaintiff's property along Woodward Avenue. The impaneling of the jury began in December 1928 and the trial started in January 1929. After several delays, one of which was due to the illness of the judge, a juror died on March 26, 1930, and a mistrial was declared on April 19, 1930.

12. A retrial was started June 21, 1930, testimony and arguments were concluded November 23, 1931, and on January 12, 1932, the jury informally notified the court that it had reached a verdict of necessity.

13. After an unsuccessful attempt on the part of the then existing Common Council to withdraw the case from the court by resolution, the jury on February 16, 1932, rendered its verdict of necessity and made an award of $9,806,453 for the Woodward Avenue property affected. That verdict was affirmed by the court July 21, 1932, resulting in condemnation of a strip of plaintiff's property, approximately 46 feet deep, fronting on Woodward Avenue, and title thereto passing to the city. The award carried an item in favor of plaintiff in the principal amount of $152,342.32. The first installment of that award with interest thereon was paid to plaintiff by the City of Detroit, July 2, 1934, as set out in finding 3. The first widening operation did not start until 1934.

14. In the meantime, on September 2, 1930, the City of Detroit had entered into a contract with the State of Michigan whereby the State agreed to pay 50 percent of the cost of widening Woodward Avenue and four other thoroughfares in the City of Detroit. The contract provided for a contribution by the State up to $15,500,000, extending over a period of five years, as its share or one-half of the estimated cost of the widening of the five thoroughfares.

Between the date of entering into the contract with the State and the making of the final award in the condemnation proceedings, the financial situation had become acute and the State did not carry out its part of the contract. On the failure of the State to advance funds the City of Detroit entered into a contract with the Wayne County Road Commission under the terms of which the Road Commission financed the city's share and the State the other half of the widening cost. No assessment of benefits was ever made against these owners or other property owners in that vicinity, to cover the cost of widening Woodward Avenue, although an assessment was originally contemplated. The money used to defray the cost and pay the awards and interest was raised by the State through the medium of gas and weight taxes on automobiles and turned over by the State to the City of Detroit.

15. During the period involved, plaintiff kept its books and reported its income on the accrual basis, although the payment of interest from the City of Detroit on the award was not accrued on plaintiff's books for the years 1932 and 1933 until after the actual receipt of the interest payments on July 2, 1934. The reason for this failure to accrue the interest payments for 1932 and 1933 following the date of the award on July 21, 1932, was due to a feeling on plaintiff's part that it was uncertain whether the city would go forward with the widening program along Woodward Avenue and, if so, as to its ability to pay, because of its financial condition.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The facts show that the City of Detroit, being desirous of condemning certain properties within the city for street-widening purposes, through its Common Council authorized and caused condemnation proceedings to be instituted to acquire the property necessary for the street-widening project, but due to the fact that the financial condition of the city was not such at that time as to warrant the continuation of the condemnation proceedings and the payment in accordance with existing statutes of such awards as might be made it

entered into an agreement with the plaintiff and a number of other property owners, which agreement provided for an extension of time of payment of such award by the city to the property owners affected of their proportion of such an award as might be made. The property owners to be affected by such condemnation proceedings agreed with the City of Detroit in Art. 2 of said agreement, as set forth in Finding 10, "to extend the time of payment of their award, or of the balance of their award, which is payable under the provisions of the charter of the City of Detroit within one (1) year from the date of confirmation, into ten (10) equal annual payments, together with interest on the unpaid balance at the rate of four and one-quarter (4¼%) percent per annum, payable annually from the date of final confirmation of such award. The first payment on the award, or the balance thereof, as the case may be, shall be made within one (1) year from the date of final confirmation, and the remaining installments annually thereafter."

Art. 7 of the agreement provided, in part, that "nothing herein contained shall in any manner limit or modify the right of the legislative body of the City of Detroit to amend or withdraw the petition [for condemnation], or to move for a new trial, order an appeal or otherwise control said proceedings as authorized by law. In the event of a withdrawal or dismisal of said proceedings, this contract shall be void."

As shown by the findings, the proceeding continued until February 16, 1932, when the jury rendered its verdict of necessity and made a total award of $9,806,453 for the Woodward Avenue property affected which included the property of plaintiff. This verdict of the jury was confirmed by the court on July 21, 1932, resulting in the condemnation, among other property, of a strip of plaintiff's property, approximately 46 feet deep, fronting on Woodward Avenue. The condemnation award included an item in favor of plantiff in the principal amount of $152,342.32. The first installment, of $15,234.23, of this award with interest of $12,604.16 on the full amount of the award from July 21, 1932, to July 2, 1934, was paid to plaintiff by the City of Detroit on July 2, 1934.

Art. 3 of the agreement between the City of Detroit and the property owners provided that the city might enter upon the property involved in the condemnation proceedings and take possession of and use the same for the purposes for which taken at any time after ninety days after the final confirmation of the condemnation award thereon. The first street-widening operation on the property condemned and taken on July 21, 1932, was not begun until 1934.

In its return for 1934 plaintiff reported $3,244.13 of the interest received covering the period January 1 to July 2, 1934, and accrued interest due on the principal amount of the award for the period July 3 to December 31, 1934, in the amount of $2,905.56, a total of $6,149.69.

Plaintiff kept its books and made its tax returns on the accrual basis. Thereafter, in 1936, the Commissioner held that plaintiff was taxable in 1934 upon the entire amount of interest of $12,604.16 paid to it on July 2, 1934, and upon a further amount of interest of $2,857.67 accrued upon the award, and available to it, to December 1934. The last mentioned amount of $2,857.67 was not actually paid to plaintiff until January 1935. As a result of this action, the Commissioner determined and assessed an additional tax of $2,090.80 which was collected with interest of $121.87, totaling $2,212.67. The amount of $9,360.03 of the total interest of $12,604.16 received by plaintiff on July 2, 1934, was entered by plaintiff on its books at the time it was received as an accrual for the period July 31 to December 31, 1932, and for the calendar year 1933, and amended returns were thereupon filed for those years. The returns for 1932 and 1933, as originally filed and as so amended, reflected net losses for such years and no taxes were paid for either year.

Plaintiff contends, first, that the interest of $12,604.16 received from the City of Detroit on July 2, 1934, and interest thereafter accruing is exempt from income tax under the provisions of section 22 (b) (4) (A) of the Revenue Acts of 1932 and 1934 on the ground that the amount represents interest upon "the obligations of a state, territory, or any political subdivision thereof," and, second, that if the interest is not wholly exempt from tax the amount of $9,360.03

thereof accrued in 1932 and 1933, and on the basis of plaintiff's accounting method, was income in those years as reported by it in its amended returns.

Whether the interest received by plaintiff is exempt from tax depends upon the meaning of the word "obligations" as used in the federal taxing acts. We think it is clear that the statute did not intend that all promises to pay or enforceable actions should constitute obligations within the meaning of that term as used in the exemption clause. The same subdivision (b) (4), in clause (C), exempts from tax "interest upon the obligations of the United States" and it has been held that the liability to make a refund of federal taxes carrying interest is not an obligation of the United States within the meaning of this section. *American Viscose Corporation* v. *Commissioner*, 56 Fed. (2d) 1033. In *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 87, the court held that section 213 (b) (4) of the Revenue Act of 1926 (44 Stat. 9, 24), providing that the term gross income shall not include "interest upon the obligations of the United States," was designed to aid the borrowing power of the Government by making its interest-bearing bonds attractive to investors, and the scope of the term must there be narrowed accordingly, and that the meaning of the word "obligations," as used in the exemption section, should not be extended to include interest upon obligations not incurred under the borrowing power. In *United States Trust Company* v. *Anderson*, 65 Fed. (2d) 575, and in *Seaside Improvement Company* v. *Commissioner*, 105 Fed. (2d) 990, it was held that interest received on a condemnation award from the date of the taking to the date of payment of the award is not exempt from taxation as interest upon an obligation of a state within the meaning of the exemption provisions of the statutes. The present obligation of the City of Detroit, the interest from which is claimed to be exempt, was not incurred by that municipality under its borrowing power. The law of Michigan, under which the land in question was condemned, grants to the city one year after confirmation of the award in which to make payment. It is also provided that the city may not enforce possession of the property con-

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demned until the treasurer of the city certifies that the amount of the award is impounded in the treasury; and further provision is made that interest at 5 percent per annum shall be paid upon the award from the date of condemnation until payment. *Campau* v. *Detroit*, 225 Mich. 519. Interest upon a condemnation award is payable as a part of just compensation whether or not it is authorized by statute. *Seaboard Air Line* v. *United States*, 261 U. S. 299; *United States Trust Company* v. *Anderson*, *supra*. In the case at bar the property in question, from the value of which plaintiff received the interest, was acquired by the city through the exercise of the power of eminent domain. The agreement between the property owners and the municipality operated only to give the city ten years instead of the statutory period of one year within which to pay, reduced the rate of interest from 5 percent to 4¼ percent, and authorized the city, notwithstanding full payment had not been made, to take possession of the land and improvements thereon within ninety days after confirmation of the verdict of the jury, of necessity, and award of compensation. The entire interest to be received was therefore, by agreement of the parties, to be interest on the condemnation award from the date of taking to the date of payment, and under the rule applied in cases above cited such interest is taxable.

The case of *King's County Development Co.* v. *Commissioner*, 93 Fed. (2d) 33, relied on by plaintiff did not involve the acquisition of property through a condemnation proceeding but concerned a direct purchase with the later assumption of purchase obligations by the political subdivision of a state. On that basis the court in holding that the interest paid was exempt distinguished the cases hereinbefore cited. The case is therefore not in point.

The case of *Norfolk National Bank of Commerce* v. *Commissioner*, 66 Fed. (2d) 48, upon which plaintiff also relies, involved the constitutional question of whether or not Congress could levy a tax upon the obligations of a state issued in order to borrow money with which to carry on its governmental functions. It is not in point here.

With reference to the years in which the interest was income, we are of opinion from the facts disclosed by the rec-

ord that since the plaintiff employed the accrual method of accounting in keeping its books and reporting its income only that portion of the interest due from the city which accrued in the calendar year 1934, in the amount of $6,149.69, was taxable in that year; and that $9,312.14 of the total interest of $12,604.16 paid to plaintiff on July 2, 1934, which represents the total of the interest accrued to plaintiff for the periods July 21 to December 31, 1932, and the calendar year 1933, was taxable income in those years rather than in 1934. All events necessary to fix the amount due plaintiff and the liability of the city to pay it had occurred. It was therefore a proper accrual, beginning on July 21, 1932, of the interest applicable to each taxable year. *United States* v. *Anderson et al.*, 269 U. S. 422, 440, 441. Every accrual has in it the possibility that the debtor may not pay, but other sections of the taxing statutes contain compensating provisions in such event. Although plaintiff did not enter upon its books the interest accrued subsequent to July 21, 1932, for the taxable years 1932 and 1933, this is not controlling. Book entries are evidentiary but not controlling in such cases. Plaintiff so reported the interest accrued in returns for 1932, 1933, and 1934. When the total interest received and accrued from the date of confirmation of the award from July 21, 1932, to December 31, 1934, is allocated to the years to which applicable on the accrual basis, no additional tax is due from plaintiff for the reason that plaintiff had net losses for the years 1932 to 1934, inclusive. The amount of $9,312.14 of interest received by plaintiff in 1934 and taxed by the commissioner as 1934 income was income properly accruable for the years 1932 and 1933; thus, the net income determined by the commissioner should be reduced by that amount. The tax on this amount of $1,280.42 plus the proportionate part of $74.83 of the deficiency interest collected, totaling $1,355.05, are the amounts which plaintiff is entitled to recover.

For the reasons above stated, only that portion of the interest amounting to $6,149.69, accrued in 1934, was taxable income in that year. On this basis plaintiff had a net loss rather than a net income.

Judgment will therefore be entered in favor of plaintiff for $1,355.05 with interest as provided by law. It is so ordered.

WHITAKER, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

THE STEEL PRODUCTS ENGINEERING COMPANY v. THE UNITED STATES

[No. 44014. Decided February 5, 1940]

On the Proofs

Increased costs to Government contractors under the National Industrial Recovery Act.—Under the Act of June 25, 1938, conferring upon the Court of Claims jurisdiction to determine, upon a fair and equitable basis, increased costs incurred by contractors as a result of the enactment of the National Industrial Recovery Act, it is held:

1. Plaintiff is entitled to recover where it is shown by competent evidence, including an audit, that plaintiff has sustained an increased cost on direct labor.
2. Plaintiff is not entitled to recover for increases to salaried employees given after the enactment of the National Industrial Recovery Act, but not incurred as a result of the enactment of said act.
3. Plaintiff is not entitled to recover for increased costs of labor and materials under certain Change Orders where such orders were made after the President's Reemployment Agreement and after wages and materials had increased in value.
4. Plaintiff is not entitled to recover for increased costs of certain materials used by plaintiff in the performance of the contract where there is no competent evidence to show such increases.
5. Plaintiff is not entitled to recover code fees paid to the Code Authorities, which fees were for the plaintiff's entire business and not solely for the contract with the Government.

The Reporter's statement of the case:

Mr. Herman J. Galloway for the plaintiff. *King & King* were on the briefs.

Mr. J. H. Reddy, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Currell Vance* was on the brief.

The court made special findings of fact, as follows:

1. Plaintiff is a corporation of the State of Ohio with principal place of business in Springfield of said State.

2. On the 22nd day of June 1933, plaintiff entered into an agreement to furnish and deliver to the defendant certain gun camera assemblies, at a unit price of $127.50 for each assembly, subject to discount. A copy of this contract is in evidence as plaintiff's Exhibit No. 1 and is made part hereof by reference. Change orders were issued on this contract December 13, 1933, for $800; February 23, 1934, for $100; and January 7, 1935, for $132.

3. August 1, 1933, the plaintiff signed the "President's Reemployment Agreement," a copy of which is filed as plaintiff's Exhibit No. 3 and made part hereof by reference.

Plaintiff made the articles called for by the contract and began their manufacture at a time subsequent to August 1, 1933.

The contract was completed by the plaintiff March 20, 1935, and the consideration named therein has been paid to plaintiff by the defendant.

August 22, 1933, the plaintiff became a party to the Aircraft Manufacturers' Code and the Special Tool, Die & Machine Shop Code, each being a Code of Fair Competition referred to in the President's Reemployment Agreement. These codes imposed no greater obligations upon the plaintiff with respect to wages or hours than the President's Reemployment Agreement.

4. Prior to August 1, 1933, labor was being employed in plaintiff's plant at 49.5 hours per week. On and after that date the hours were reduced to 40 per week, with a few instances of employment over 40 hours. Plaintiff had been operating on a 49.5-hour week for about a year. The men were employed on an hourly basis.

Direct work on the contract began about the middle of September 1933.

5. The plaintiff did not adjust the wages of each employee so that they received for 40 hours a week as much as they had previously received for 49.5 hours a week. They did make gradual increases in hourly rates during the life of the contract.

6. The increase in wages for all direct labor on the contract after July 30, 1933, was $2,507.61, for indirect labor, such as janitors, millwrights, store clerks, watchmen, proportionately applicable to the contract, $206.58, and for labor on tools, dies, patterns and related work, $212.72, a total of $2,926.91. This total increase was in furtherance of an equitable readjustment of plaintiff's pay schedules.

7. Of the increase of $2,926.91 in cost of labor, approximately $49.27 was in connection with the change orders set out in Finding 2. In performance of its contract plaintiff incurred an increase of $2,877.64 in cost as a result of enactment of the National Industrial Recovery Act of June 16, 1933, for which it has not been compensated in an agreed price.

Other items sued for are not proved to be due to such enactment.

8. On June 22, 1935, plaintiff filed with the Director of Procurement, Treasury Department, its claim for relief under Public Act, 369, approved June 16, 1934, covering the subject matter of this suit, which was denied by the Comptroller General November 30, 1936, and it has not been paid.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This cause was brought by the plaintiff under an act of Congress approved June 25, 1938 (52 Stat. 1197), reading in part as follows:

> * * * That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and enter judgments against the United States upon the claims of contractors, including completing sureties and all subcontractors and materialmen performing work or furnishing material to the contractor or another sub-

> contractor, whose contracts were entered into on or before August 10, 1933, for increased costs incurred as a result of the enactment of the National Industrial Recovery Act: *Provided*, That (except as to claims for increased costs incurred between June 16, 1933, and August 10, 1933) this section shall apply only to such contractors, including completing sureties and all subcontractors and materialmen, whose claims were presented within the limitation period defined in section 4 of the Act of June 16, 1934 (41 U. S. C., secs. 28–33).

The third section of the act provides that a judgment or decree shall be on a fair and equitable basis.

The sole question in the case is the amount of increased costs which the plaintiff incurred by reason of enactment of the National Industrial Recovery Act (48 Stat. 195).

Plaintiff entered into a contract with the defendant on June 22, 1933, whereby it agreed to furnish certain gun camera assemblies for a unit price of $127.50 or for all units a total sum of $25,500. On August 1, 1933, plaintiff signed the President's Reemployment Agreement which agreement was provided for by the National Industrial Recovery Act and on August 22, 1933, plaintiff became bound by certain codes which contained provisions for wages and hours similar to those contained in the President's Reemployment Agreement. As a result of signing the President's Reemployment Agreement, plaintiff reduced its hours of employment from a 49.5 hour per week basis to 40 hours per week.

It is contended by the plaintiff that it is entitled to receive the increased cost for its direct labor, certain overhead charges, increased cost of material and the increased cost to it for certain Change Orders made during the life of the contract on which it procured estimates and was granted the work. In arriving at the amount of its loss, plaintiff took only the testimony of its General Manager and the method pursued by him in arriving at the amount was the average rate of pay of some of the employees prior to entering into the President's Reemployment Agreement and the selection of certain weeks' wages paid under the President's Reemployment Agreement during the life of the contract, and from these an average increase was obtained. In using

this method plaintiff did not take into consideration all the direct employees working on this contract but attempted to arrive at an average wage differential method.

In proving a loss under the National Industrial Recovery Act it is incumbent upon the plaintiff to establish the increased costs by competent evidence and not merely estimates, differentials, or percentages. The mere statement that plaintiff believes it suffered a loss, without any supporting evidence that an actual loss was incurred, cannot be sustained. Plaintiff did not have an audit of its books made. The evidence shows that the defendant made an audit of plaintiff's books and took from the pay-roll records of each employee the increased wages for the duration of the work under this contract. The books of the plaintiff are certainly the best evidence of what was actually paid to the employees and the increased costs can be ascertained readily from a compilation of what was paid before the passage of the National Industrial Recovery Act and what was paid afterwards. As a result of this audit, it is shown that plaintiff has sustained an increased cost on direct labor of $2,877.64 for which it has not been reimbursed and this amount it is entitled to recover.

Plaintiff also contends that an increase in overhead costs was occasioned as a result of the President's Reemployment Agreement but the evidence shows that a due allowance has been made by the auditor for all employees who were employed on an hourly basis. There can be no contention that the hours of those on a straight salary basis were affected by the National Industrial Recovery Act in any manner nor were their salaries raised on account of it. The President's Reemployment Agreement did not apply to salaried employees generally nor extend to those receiving more than $35 per week. Under the Jurisdictional Act plaintiff is only entitled to recover an increased cost from the enactment of the National Industrial Recovery Act and if plaintiff gave increases to salaried employees, whose wages and hours were not affected by this law, it is apparent that they were not incurred as a result of the passage of the National Industrial Recovery Act merely because they were granted after the passage of the Act. No recovery can be had on this item.

Plaintiff also claims that it is entitled to recover increased costs of labor and materials which were necessary because of certain Change Orders on which plaintiff had made estimates and been granted the work by the defendant. All of the Change Orders were made after the President's Reemployment Agreement and after wages and materials had increased in value. Plaintiff did take or should have taken into consideration the increased cost of labor and increased cost of materials when it estimated on these Change Orders and was granted permission to do the work for the amount quoted to the contracting officer. There can be no recovery on this item.

It is contended also that the cost of certain materials used by plaintiff in the performance of the contract was increased. The burden is on the plaintiff to prove this increased cost. There is no competent evidence to show any increase in the cost of materials but, on the contrary, in one instance, where plaintiff claims an increased cost in the purchase from a material house, there is a flat denial that the increase was occasioned by the passage of the Act and an assertion that the price paid was the fixed price of the article.

The mere fact that the plaintiff had quotations from one party and purchased from another party at a higher price does not establish that the cost of material which entered into the contract was affected by the passage of the National Industrial Recovery Act. There must be some supporting evidence to prove that the article did increase in value and that the plaintiff was put to an increased cost when purchasing materials after the passage of the Act.

Plaintiff also contends that it is entitled to recover certain code fees which it had to pay during the performance of the contract. The fees paid to the Code Authorities were for plaintiff's entire business and not solely for the contract with the Government. No attempt has been made and no competent evidence has been introduced to show what proportion of these fees applied to the Government contract and what applied to the plaintiff's private contracts. Without some competent evidence to show what proportion the Government contract bears to the other work performed by

the plaintiff, by which the fees assignable to the Government contract might be computed, there can be no recovery.

A fair and equitable decree for the loss sustained by the plaintiff and for which it is entitled to recover is the sum of $2,877.64. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge,* concur.

WHITAKER, *Judge*, took no part in the decision of this case.

EDWARD J. POSSELIUS v. THE UNITED STATES

[No. 43980. Decided February 5, 1940]

On the Proofs

Income tax; interest on municipal condemnation award taxable.—Under the agreement between the city of Detroit and property owners, including the plaintiff, for extension of time for payment of compensation award in condemnation proceedings, whereby interest on such award at a reduced rate was to run from date of taking to date of payment, such interest was taxable, notwithstanding statutory exemption of interest upon the "obligations" of a State, Territory, or political subdivision thereof. See *Williams Land Company, ante,* p. 499.

The Reporter's statement of the case:

Mr. James A. Cosgrove for the plaintiff. *Mr. Raymond H. Berry, Mr. Ralph W. Barbier,* and *Mr. Arthur L. Evely* were on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

Plaintiff seeks to recover $927.34, income tax alleged to have been erroneously and illegally collected for 1934. This tax resulted from the inclusion in plaintiff's income of $4,900.34 representing interest received by plaintiff in 1934 from the City of Detroit on his portion of a condemnation

award confirmed by the court on July 21, 1932, for certain property taken by the City of Detroit in connection with the widening of Woodward Avenue in that city.

The court, having made the foregoing introductory statement, entered special findings of fact, as follows:

1. Plaintiff is a citizen of the United States and a resident of Detroit, Michigan.

2. Plaintiff duly filed his individual income-tax return for the calendar year 1934 on March 15, 1935, which reflected a total tax due of $2,727.84. Plaintiff paid that tax in four installments as follows: $667.05 on March 18, 1935, and $686.93 on June 13, September 12 and December 6, 1935.

3. February 18, 1937, plaintiff filed a claim for refund of $927.34 for 1934 on the following grounds:

> In connection with the attached signed claim on the 1934 income tax return, filed March 15, 1935, there was included in net income the amount of $4,900.34, representing the interest paid me by the City of Detroit in connection with the widening of Woodward Avenue.
>
> I recognize that interest on condemnation awards as such are not tax free, but this interest was paid not as a direct result of the condemnation board but as a result of a certain contract entered into between the City and some of the property owners along Woodward Avenue. This contract, or agreement was sought by the City for financial reasons, to permit the easier payment of the awards; consequently, this became, for all tax purposes, the equivalent of borrowing by the City of the amount in question and repayment on a serial basis of a 10-year period. The interest rate was fixed by agreement and the contract interest rate differs from the interest rate on condemnation awards fixed by statute.
>
> It is therefore believed that the interest payable by the terms of these 10-year agreements does constitute interest on an obligation issued by the City of Detroit and is therefore exempt from income tax.

The Comissioner of Internal Revenue rejected that claim in its entirety and notified plaintiff of his action by registered letter dated September 21, 1937. No portion of the taxes paid and for which refund was claimed has been paid or credited, or otherwise refunded to plaintiff.

Reporter's Statement of the Case

4. June 22, 1928, plaintiff and his brother and sister held title as trustees to a certain tract of land fronting on Woodward Avenue in Detroit, Michigan, such property having been acquired by virtue of a deed of trust executed by their father in 1919. Plaintiff and his brother and sister were also beneficiaries under the deed of trust in that they were each entitled to all of the income from the property during their lifetime and upon their death the corpus of the trust passed to their children. The income was payable to the life tenants currently.

5. Prior to 1928 the widening of Woodward Avenue had been under consideration for sometime by certain people and groups in the City of Detroit, and two different plans had been suggested. October 6, 1925, the voters of the City of Detroit voted on these two plans and approved one of them, which necessitated taking part of the property held by plaintiff and his cotrustees. After that vote a resolution of necessity was passed by the Common Council of Detroit on July 12, 1927. The resolution was conditioned on the Woodward Avenue Improvement Association, of which plaintiff was a member, getting at least 75 percent of the property owners affected by the widening to sign financing agreements before the start of court proceedings to condemn the property. July 13, 1927, the Mayor of Detroit vetoed the resolution, stating in his message that the financial condition of the City was such that the City could not go forward with the widening program.

6. By September 13, 1927, the Woodward Avenue Improvement Association had obtained the signatures of 87 percent of the property owners affected by the proposed widening, and on that date the Common Council passed the resolution over the Mayor's veto.

The financing agreements signed by plaintiff and other property owners were on a printed form drawn up by the corporation counsel of the City of Detroit and attorneys representing the Woodward Avenue Improvement Association. The agreement signed by plaintiff read as follows:

> *Whereas* it is the desire of the City of Detroit and various property owners along Woodward Avenue that said street be widened from the northerly line of Adams

Avenue north to the southerly line of Grand Boulevard as soon as possible and the City of Detroit through its Common Council has caused condemnation proceedings to be instituted in the Recorder's Court of the City of Detroit for the purpose of said widening (File No. 1610) but the financial condition of the City of Detroit is not such at the present time as to warrant the continuance of said proposed condemnation proceedings and the payment of the awards unless a satisfactory plan for the extension of the time of payment of same is consented to by property owners and other parties in interest.

Therefore be it agreed by and between the parties as follows:

1. Parties of the second part severally agree that in the event of the finding of a verdict of necessity for said improvement by the jury in said condemnation proceeding, and upon final confirmation of the total award for damages in connection with said parcel, the City of Detroit may withhold the payment of said award until the determination of the special assessments to be imposed in connection with the same, and may thereupon deduct from the amount of said award to the second parties interested therein the amount of the special assessments chargeable against said parties of the second part in connection with said condemnation: *Provided, however*, That subject to the limitations contained in paragraph 4 hereof, nothing herein contained shall limit the right of the parties of the second part to contest the necessity of said proposed improvement or to move for a new trial in said condemnation suit or to appeal from the judgment of confirmation, and that nothing herein contained shall affect or impair the right of the parties of the second part to appeal from or take proceedings to contest in any manner provided by law the validity or propriety of any special assessment imposed for any part of the compensation awarded in said condemnation proceeding.

2. Parties of the second part hereto further severally agree to extend the time of payment of their award, or of the balance of their award, which is payable under the provisions of the charter of the City of Detroit within one (1) year from the date of confirmation, into ten (10) equal annual payments, together with interest on the unpaid balance at the rate of four and one-quarter (4¼%) percent per annum, payable annually, from the date of final confirmation of such award. The first payment on the award, or the balance thereof, as the

case may be, shall be made within one (1) year from the date of final confirmation, and the remaining installments annually thereafter.

3. Parties of the second part further agree that the City of Detroit may enter upon and take possession of and use said described land and premises for the purpose for which it was taken, and may remove all buildings, fences and other obstructions at any time therefrom after ninety (90) days after the final confirmation of the award thereon. Second parties will, upon said final confirmation and first payment as provided for above, execute the usual deed of title to said property, subject to the rights of any lessee or lessees, but said judgment or any part thereof shall remain a lien against said property until paid, which lien may be enforced by foreclosure in chancery in the manner provided for foreclosure of mortgages.

4. The benefits of the provisions of Sections 15 and 16 of Chapter 1 of Title 8 of the charter of the City of Detroit, and of all other provisions of law relative to the time of the payment of condemnation awards, or providing for the payment other than annually as herein provided, or other matters conflicting with the foregoing paragraphs, are hereby waived, and second parties expressly agree not to question or contest the validity of this agreement or to assert for their benefit any provision of law which would contemplate the payment of said awards or the withholding of such use and possession of said premises other than as provided herein.

5. The City of Detroit reserves the right to pay said awards on or before the times above agreed to.

6. The City of Detroit agrees that said awards, or any balances owing thereon, shall be at all times considered as tax-exempt by first party and that the same shall not be placed upon the assessment rolls of the City of Detroit for tax-assessment purposes.

7. This agreement shall upon final confirmation of the awards in said proceedings also be construed to be a contract of purchase of the land, property, and improvements described at the price awarded by the condemnation jury, provided nothing herein contained shall in any manner limit or modify the right of the legislative body of the City of Detroit to amend or withdraw the petition, or to move for a new trial, order an appeal, or otherwise control said proceedings as authorized by law. In the event of a withdrawal or dismissal of said proceedings, this contract shall be void.

8. This contract is binding upon the respective heirs, assigns, successors, or personal representatives of the parties hereto.

7. Condemnation proceedings were thereupon instituted in the Recorder's Court for Wayne County, Michigan, in November 1927 looking to the condemnation of certain property, including a strip of plaintiff's property along Woodward Avenue. The impaneling of the jury began in December 1928, and the trial started in January 1929. After several delays, one of which was due to the illness of the Judge, a juror died on March 26, 1930, and a mistrial was declared on April 19, 1930.

8. A retrial was started June 21, 1930, testimony and arguments were concluded November 23, 1931, and on January 12, 1932, the jury informally notified the court that it had reached a verdict of necessity.

9. After an unsuccessful attempt on the part of the then existing Common Council to withdraw the case from the court by resolution, the jury on February 16, 1932, rendered its verdict of necessity and made an award of $9,806,453 for the Woodward Avenue property affected. That verdict was affirmed by the court July 21, 1932, resulting in condemnation of a strip of plaintiff's property approximately 46 feet deep, fronting on Woodward Avenue, and title thereto passing to the City. The award carried an item in favor of plaintiff and his cotrustees in the principal amount of $194,-074.41. The first widening operations did not take place until 1934.

10. In the meantime, on September 2, 1930, the City of Detroit had entered into a contract with the State of Michigan whereby the State agreed to pay 50 percent of the cost of widening Woodward Avenue and four other thoroughfares in the City of Detroit. The contract provided for a contribution by the State up to $15,500,000, extending over a period of five years, as its share, or one-half of the estimated cost of the widening of the five thoroughfares.

Between the date of entering into the contract with the State and the making of the final award in the condemnation proceedings, the financial situation had become acute, and the State did not carry out its part of the contract. On

the failure of the State to advance funds the City of Detroit entered into a contract with the Wayne County Road Commission, under the terms of which the Road Commission financed the City's share and the State the other half of the widening cost. No assessment of benefits was ever made against the owners or other property owners in that vicinity to cover the cost of widening Woodward Avenue, although an assessment was originally contemplated. The money used to defray the cost and pay the awards and interest was raised by the State through the medium of gas and weight taxes on automobiles and turned over by the State to the City of Detroit.

11. The first installment of the award in favor of plaintiff in the amount of $19,407.44 was paid to plaintiff May 4, 1934, under the financing agreement with plaintiff and his brother and sister as trustees, and represented 10 percent of the principal of the award. The first payment of interest covering the period July 21, 1932, to April 13, 1934, at 4¼ percent, in the amount of $14,701.04, was made to plaintiff May 9, 1934.

Upon receipt of these payments the respective amounts were recorded in the trust books by plaintiff as trustee. May 14, 1934, after securing the indorsement of his brother and sister, plaintiff paid to each of them their distributive share of the interest received, namely, $4,900.34, and recorded his share in his individual books. The payment on account of principal was retained by the trustees as part of the trust funds.

12. During the period involved in this proceeding plaintiff kept his books on the cash receipts and disbursements basis. The interest payment of $4,900.34 received on May 14, 1934, was reported in his income-tax return for the calendar year 1934 as taxable income and tax paid thereon.

13. There has been no change in the status of the trust estate from the original acquisition in June 1919 to the present date except for that portion of the property acquired by the City under the terms of the condemnation award and financing agreement heretofore referred to. The trustees filed a return for 1934 and reported therein the receipt of the installment payment on acount of the principal of the award.

Syllabus

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff contends that the interest of $4,900.34 paid to and received by him in 1934, under the circumstances set forth in the findings, was exempt from tax under the provisions of section 22 (b) (4) (A) of the Revenue Act of 1934 (48 Stat. 680) as being interest upon an obligation of a state, territory, or a political subdivision of the State of Michigan. For the reasons set forth in the case of the *Williams Land Co.* v. *United States*, decided this date, *ante* p. 499, we hold that the interest in question was taxable and was properly included in plaintiff's gross income for 1934. Plaintiff is, therefore, not entitled to recover and the petition is dismissed. It is so ordered.

WHITAKER, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

ORVILLE JACKSON v. THE UNITED STATES

[No. 44052. Decided February 5, 1940]

On the Proofs

Property of Army officer lost or destroyed; "military duty".—A commissioned officer in the United States Army, occupying rented quarters because no public quarters were available while on active duty at Jeffersonville Quartermaster Depot, Jeffersonville, Indiana, was ordered to report for duty during the Ohio River flood of January and February, 1937, and remained on military duty throughout the flood, for the purpose of saving human life and United States Government property, and during this period his own household property was damaged or destroyed by the action of the flood waters, without fault or negligence on his part.

Held:

That private property of an Army officer lost or damaged while in a private residence because no public quarters were available was "in the military service" within the meaning of the act of March 4, 1921. *Jonitz* v. *United States*, 89 C. Cls. 155, cited.

Same; decision of Secretary of War.—Under section 4 of the act of March 4, 1921, the decision of the Secretary of War was "a final determination of any claim cognizable under this chapter."

The Reporter's statement of the case:

Ansell, Ansell & Marshall for the plaintiff. *Mr. Mahlon C. Masterson* was on the brief.

Mr. Paris Houston, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court, upon stipulation of the parties, made the following special findings of fact:

During the period involved in this case, plaintiff was an officer on active duty in the Quartermaster Corps, United States Army, with the rank of major.

By Special Orders No. 62, dated March 17, 1933, the plaintiff, then captain, was assigned to duty at Jeffersonville Quartermaster Depot, Jeffersonville, Indiana, and was on duty there during the period from January 22 to February 4, 1937. Public quarters were not assigned to plaintiff while on such duty during the period in question for the reason that there were none available, and he was paid rental allowance and compelled to provide private quarters for himself and family at his own expense.

On January 22, 1937, the Ohio River was at flood stage at Jeffersonville, Indiana. By orders of his commanding officer, at 3:30 A. M. on January 22, 1937, the plaintiff reported at Jeffersonville Quartermaster Depot, and remained on military duty under such orders continuously throughout the flood, from January 22 to February 4, 1937, for the purpose of saving human life and United States Government property.

While so engaged in authorized military duties, and in consequence of his having given his attention to the saving of human life and property belonging to the United States, plaintiff's private property, namely, furniture and household goods, was damaged or destroyed by the action of the flood waters, without fault or negligence on his part. At the time he left his quarters for duty, he had no reason to believe that his own property was in danger of being de-

stroyed, and his duties prevented him from ascertaining the condition of his own property until approximately 15 days after the beginning of the flood.

By letter dated April 29, 1937, under the provisions of Army Regulations 35–7100, War Department, dated October 10, 1929, plaintiff requested that he be reimbursed for the loss of his furniture and household goods so destroyed, as per list of articles submitted with his claim showing the condition and value of the property at the time of the loss. The total value of the articles at the time of the loss as shown in this list was $1,095.55.

By Special Orders No. 27, dated April 29, 1937, under the provisions of Paragraph 2 of Army Regulations 35–7100 (pursuant to the Act of March 4, 1921, 41 Stat. 1436), a Board of Officers was appointed for the purpose of investigating and making recommendations as to plaintiff's claim for reimbursement for loss of furniture and household goods during the period in question; and, after a thorough investigation, the Board found that plaintiff was on authorized military duty during the emergency at the Jeffersonville Quartermaster Depot, for the purpose of saving human life and United States property, and that while so engaged his own personal property was damaged or destroyed by the action of the flood waters; that he was not responsible for the catastrophe and that the damage to and loss of his own property was without fault or negligence on the part of the plaintiff and recommended that he be reimbursed for such loss in the sum of $746.90.

The Board found also that the damage and loss were not covered by insurance, and that the property, the reimbursement for the loss of or damage to which was recommended, was required to be possessed and used by the plaintiff and was reasonable, useful, necessary and proper for the plaintiff to have in his possession in the public service in the line of duty while in quarters or in the field.

By letter dated November 8, 1937, from the Finance Department, plaintiff was advised that the Board of Officers recommended an award to him of $746.90 for the loss of or damage to his private property, with the comment that from a preliminary review it would appear that the recom-

mendation is just and equitable; and that if satisfied with the award the original report of the Board should be signed and returned to that office for payment. Accordingly, plaintiff signed and forwarded the report to the Office of the Chief of Finance; and that office, by letter dated November 15, 1937, advised the Secretary of War that the Board of Officers convened in the Office of the Chief of Finance had considered the claim and recommended that the plaintiff be reimbursed in the amount of $746.90.

Under the authority of the Act of March 4, 1921, the Assistant Secretary of War examined into the claim and issued the following certificate dated December 3, 1937:

> It is hereby certified that the articles of property, in the items and values as found by the Board were reasonable, useful, necessary, and proper for the claimant to have in his possession in the public service in the line of duty, while in quarters, or in the field, that the loss occurred under the circumstances ascertained and determined by the Board and without fault or negligence on the part of the claimant and that none of the items can be replaced in kind from Government property on hand. The value is hereby, under the provisions of the act of Congress of March 4, 1921 (41 Stat. 1436), ascertained and determined in the amount recommended by the Chief of Finance.
>
> In accordance with the foregoing recommendation of the Chief of Finance and with the recommendation of The Judge Advocate General, contained in Memorandum dated December 1, 1937, to The Assistant Secretary of War, the findings and recommendations of the board of officers convened in the Office of the Chief of Finance in the matter of the inclosed claim of Major Orville Jackson in the sum of $746.90 is accordingly approved, but although approved, payment is not authorized unless the claim is allowed by the Comptroller General. Major Jackson will be so informed.
>
> (Sgd) LOUIS JOHNSON,
> *The Assistant Secretary of War.*

This claim, or any part thereof, has not been paid for the reason that the Comptroller General held in an advance decision that the property lost by the plaintiff was not at the time "in the military service" as required by the statute.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This is a suit begun under the Act of March 4, 1921, 41 Stat. 1436, by a commissioned officer in the United States Army for reimbursement for loss of furniture and other property, damaged or destroyed by the flood waters of the Ohio River while the plaintiff was on military duty engaged in saving human life and property belonging to the United States. It appears that at the time in question no public quarters were available and plaintiff was compelled to rent quarters in which he placed his household goods and other property destroyed by the flood. The only defense set up is found in the Comptroller General's decision on the claim in which he held that the private property of an officer, lost or damaged while in a private residence, was not "in the military service" as required by the statute.

The case of *Franz J. Jonitz* v. *United States*, 89 C. Cls. 155, decided by this court May 29, 1939, is almost identical to the case at bar. The plaintiff therein, because of no public quarters being available, had his goods stored in a private residence and, by reason of his attention to his military duties, they were destroyed. The Comptroller General ruled against the claim but this court held that the plaintiff could recover. We think this decision must be followed for the reason that the claim had been presented to the Secretary of War, who determined all questions arising thereon in favor of the plaintiff, and Section 4 of the act on which plaintiff relies makes such action "a final determination of any claim cognizable under this chapter."

Plaintiff is entitled to judgment for the amount of the loss he sustained, as found by the Board of Officers appointed to consider the same and approved by the Secretary of War, in the sum of $746.90. Judgment will be rendered accordingly.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge;* took no part in the decision of this case.

CHARLES E. PADEN v. THE UNITED STATES

[No. 44806. Decided February 5, 1940]

On Defendant's Motion to Dismiss

Cases sounding in tort; jurisdiction.—Where the allegations of the petition are grounded upon alleged torts of the defendant's officers and agents, and upon plaintiff's fears that certain other tortious acts are about to be committed by the defendant that will cause plaintiff further injury, it is held that the Court of Claims is without jurisdiction.

Same.—Actions sounding in tort are not cognizable in the Court of Claims.

Same.—Where the gravamen of plaintiff's complaint in essence is false imprisonment, it has been held since *Spicer's case*, 1 C. Cls. 316, that the Court of Claims is without jurisdiction.

Mr. Charles E. Paden, per se, for the plaintiff.

Mr. Carl Eardley, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

WILLIAMS, *Judge*, delivered the opinion of the court:

This case comes before the court on the defendant's motion to dismiss the petition on the ground that the Court of Claims is without jurisdiction to entertain the subject matter set forth in the petition.

The petition, a rambling and more or less incoherent document, in substance alleges that plaintiff is the sole and exclusive owner of trade-mark No. 115,462, titled "Lubri-Gas," as first registered to him in the United States Patent Office, at Washington, D. C., on February 13, 1917, and re-registered to him on March 23, 1937, for twenty years from February 13, 1937, and that he is also the sole and exclusive owner of registered label No. 25,673, titled "Lubri-Gas," as registered to him in the United States Patent Office at Washington, D. C., under date of February 27, 1923; that he is the sole and exclusive owner of all rights and profits accrued, accruing, or that may accrue from the registered trade-mark and label and resulting from the manufacture, sale, distribution, and advertising of Lubri-Gas, Lubri-Gas

chemicals, and resultant products such as lubricating gasoline and lubricating motor fuels, obtained by processing ordinary gasoline and other combustion engine fuels with the trade-marked product "Lubri-Gas"; that the said products by reason of their superior merits and unsurpassed qualities became known and recognized as products of national and international repute and products of great value.

It is next alleged that plaintiff has been unlawfully imprisoned in the Leavenworth Penitentiary for a period of four years, and that as a result thereof he has been unable to protect his trade-mark and label; that his imprisonment resulted from the machinations of the defendant's officers and agents; that the defendant's officers and agents threaten to continue such unlawful imprisonment beyond the date plaintiff's term will have been fully served; that as a consequence plaintiff will be unable to protect his trade-mark and label during the period of the threatened unlawful confinement, and that defendant's officers and agents are unlawfully attempting to deprive him of his constitutional right to protect his trade-mark and label in the federal courts.

After stating his grievances in detail the plaintiff alleges that the amount involved "in this, the most un-American, unlawful, unconstitutional case ever placed upon the docket of a federal court or recorded in the annals of a government is more than can be expressed in monetary figures," but so "that future generations of citizens of this nation may know that the executives, officers, officials, agents, and employees of this government cannot so persecute, punish, and rob a citizen of his liberty and property without due process of law and for personal gain or reward plaintiff states that the amount involved is in excess of One Billion ($1,000,000,000) Dollars cash."

Thereafter plaintiff prays for relief as follows:

1. "Fifty Thousand ($50,000) cash per day for each day from and after the date of filing of this claim until this cause will have been determined, that the defendant * * * in any way or manner, or for any reason or purpose, or purported purpose, to any degree, or in any way or manner restrains, or attempts to restrain, limit, or forbid plaintiff from the right to do any and all things necessary and

expedient for plaintiff to do to protect plaintiff's title, rights, and interest in his trade-mark rights, or other property that plaintiff may have and own."

2. "One Hundred Thousand ($100,000) Dollars per day for each day or part of each day that plaintiff is any way delayed or prevented or denied his constitutional right to use the courts of this nation as courts of justice to hear and determine his cause according to the law governing such cases."

The allegations of the petition, together with plaintiff's prayer for relief, leave no room for doubt that plaintiff's action is grounded upon alleged torts of the defendant's officers and agents, and upon plaintiff's fears that certain other tortious acts are about to be committed by the defendant that will cause him further injury. Needless to say, actions sounding in tort are not cognizable in the Court of Claims. *Schillinger* v. *United States*, 155 U. S. 163; *Flynn* v. *United States*, 65 Ct. Cls. 33.

The gravamen of plaintiff's complaint in essence is false imprisonment. That the Court of Claims is without jurisdiction in regard to such actions has been settled since *Spicers*' case, 1 Ct. Cls. 316. The court in that case said:

> The recitals of the petitioner as to his arrest and imprisonment, and his losses by reason thereof, are too remote and accidental to sustain a cause of action. Because the Government, or some person supposed to have been acting under its authority, may be supposed to have been guilty of a tort, or false imprisonment, by reason of which the business of the petitioner was injured or neglected, and he thereby suffered loss, does not present such a state of facts as will enable us to entertain jurisdiction. We cannot enter upon so wide a field of judicial doubt and uncertainty as this would indicate.

Obviously, the motion of the defendant to dismiss the petition for want of jurisdiction must be allowed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

FREDERICK WOLSIEFFER v. THE UNITED STATES

[No. 43913. Decided February 5, 1940]

On the Proofs

Pay and allowances; dependent mother.—Where the father and mother of a bachelor officer in the United States Navy have for years been separated, the father being incapable of supporting his wife, and said officer has been, and is, the chief support of his mother, it is held that the mother is "dependent" within the meaning of section 4 of the Act of June 10, 1922, as amended by the Act of May 31, 1924.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *King & King* were on the brief.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff seeks to recover the allowances authorized by law to an officer of his rank having a dependent mother for the period June 17, 1934, to date of judgment.

The court made special findings of fact, as follows:

1. Plaintiff, a bachelor officer in the United States Navy, was first appointed a Midshipman on June 28, 1928; on June 2, 1932, he was commissioned Ensign, and on June 2, 1935, he was promoted to the rank of Lieutenant, junior grade, and has served continuously on active duty since June 2, 1932.

2. Plaintiff's father and mother have been separated since 1929. His father was employed in the Fire Department of Atlantic City, New Jersey, beginning about 1904, and at one time prior to June 17, 1934, was paid a salary of as much as $200 a month. The father and mother have not corresponded with each other since their separation and the mother does not know, and has not known for several years, what position, if any, he has in the Fire Department or what salary he has received, or is receiving. However, the best

information she has, which was obtained from friends, is that he is not now actively employed but instead has been retired and placed upon a small pension. Prior to that she had been informed that his salary had been reduced and that it was being paid in "scrip" rather than in money.

At the time plaintiff's father and mother separated in 1929, the father was ordered by the court to contribute $26 a month to his wife. He complied with the court order until about 1936. During that year he contributed only $52 to his wife, and since that he has contributed nothing. Plaintiff's mother has not attempted to force him to comply with the order of the court for the reasons that she found him to be ill, that his salary had been reduced, and that he was unable to contribute to her support; and she therefore concluded that the court would not enforce its order in the circumstances.

3. Plaintiff's mother, Mrs. Minnie F. Wolsieffer, is 60 years of age. She is now, and during the period covered by this claim has been, in very poor health, suffering from arthritis, heart trouble, and hardening of the arteries. Her age and physical condition have rendered it impossible for her to obtain or to hold any gainful employment.

The only real property owned by her is an unimproved lot at Pinewald, New Jersey, which she purchased many years ago for $450, but which she now values at but $125. She has never realized any income from this property, but instead has been required to expend approximately $6 a year in the payment of taxes on it.

She owns no income producing personal property except an annuity from which she realizes an income of $100 a year, which annuity was given to her by a friend a number of years ago.

4. Plaintiff's mother has one son other than the plaintiff. This son is older than the plaintiff and is employed as a commercial artist in Philadelphia, Pennsylvania. He earns not more than $500 or $600 a year and at no time has been able to contribute anything to his mother.

5. Since June 17, 1934, plaintiff's mother has lived alone in a rented apartment, first in San Diego, California, and later at Long Beach, California. Her reasonable and neces-

sary living expenses have been about $95 a month. She pays $30 a month rent for the apartment which she now occupies in Long Beach and theretofore paid $50 a month rent for the apartment she occupied while living in San Diego, California. The balance of her necessary living expenses was expended for such items as food, clothing, gas, electricity, doctors' bills and medicine, and incidentals.

6. The plaintiff on July 27, 1932, made an allotment of $30 a month to his mother, the first payment to be made in September 1932. This allotment was changed after one payment to his mother and a new allotment of $50 a month made to her, beginning October 1932. Plaintiff's allotment of $50 a month remained in effect until after October 1935, when it was changed to $80 a month, which allotment is still in force, and all payments have been regularly made.

In addition to his allotment to his mother, plaintiff has from time to time since 1932 made contributions to her in cash, which contributions have amounted to $600. The cash contributions so made by plaintiff were used by his mother to pay her medical bills. Since June 17, 1934, plaintiff's mother has had no income from any source other than the contributions made to her by the plaintiff, the $100 a year which she receives from her annuity, and the $26 a month contributed to her by her husband, which contribution ceased after the payment of $52 in 1936.

7. Since June 17, 1934, and at the present time, plaintiff's mother has been and is in fact dependent upon him for her chief support within the meaning of section 4 of the Act of June 10, 1922, 42 Stat. 625, as amended by the Act of May 31, 1924, 43 Stat. 250.

The court decided that the plaintiff was entitled to recover.

OPINION PER CURIAM: The statutory allowance herein claimed by plaintiff which is authorized to be paid to an officer of his rank whose mother is in fact dependent upon him for her chief support was denied him on the ground that plaintiff's father was living and that it was the duty of the father to support plaintiff's mother. The statute provides simply "That the term 'dependent' as used in the succeeding

sections of this Act shall include at all times and in all places a lawful wife and unmarried children under twenty-one years of age. *It shall also include the mother of the officer provided she is in fact dependent on him for her chief support.*" (Italics ours.) The facts in this case show that during the period of the claim plaintiff's mother was in fact dependent upon him for her chief support within the meaning of the statute, and plaintiff is entitled to recover. *Freeling* v. *United States*, 64 C. Cls. 364; *Haas* v. *United States*, 66 C. Cls. 718; *Abson* v. *United States*, 73 C. Cls. 442; *Bradley* v. *United States*, 74 C. Cls. 521.

Judgment for the amount due will be entered upon receipt of a computation showing the amount due. It is so ordered.

On May 6, 1940, on report from the General Accounting Office, judgment was entered in the sum of $4,406.59.

DAWNIC STEAMSHIP CORPORATION v. THE UNITED STATES

[No. L–130. Decided March 4, 1940]

On the Proofs

Claims filed with U. S. Shipping Board; statute of limitations.—In a controversy arising out of the requisitioning in 1917 by the United States of the hulls of four steamships under construction in the United States for foreign concerns and the contracts for their completion, whereby the plaintiff claims its predecessor in interest was deprived of the right to operate the steamships when completed on the initial voyage from New York to France, and of the profits resulting therefrom, it is alleged that plaintiff's predecessor on November 5, 1917, filed with the United States Shipping Board a claim asking just compensation for its rights and property so requisitioned, which claim in response to letter, March 18, 1918, from plaintiff's predecessor, was held in abeyance until certain other related claims should be settled by the Shipping Board, but on or about July 25, 1918, plaintiff's predecessor, by its president, requested prompt consideration of said claim. The Shipping Board (Fleet Corporation) proceeded to consider said claim but thereafter received a letter, May 8, 1923, from claimant withdrawing said claim without prejudice.

Syllabus

Related claims, referred to, were settled about September 22, 1926.

On August 26, 1929, plaintiff's predecessor, by letter, petitioned the Shipping Board "to resume consideration" of said claim. After some correspondence a hearing was granted, and on January 15, 1930, after a report from its committee on claims recommending the request for reconsideration be declined for the reason that more than six years had elapsed since said claim was withdrawn, and more than twelve years since the claim originated, the Shipping Board declined to resume consideration of said claim.

On April 23, 1930, plaintiff filed its petition in the Court of Claims in the instant case, and on November 22, 1930, plaintiff filed an amended petition more in detail but making the same allegations, and on February 6, 1932, plaintiff filed a second amended petition in four counts. The plaintiff contends that the statute of limitations did not commence to run until the Shipping Board had declined, on January 15, 1930, to resume consideration of its claim.

Held: Where there was nothing to prevent plaintiff's predecessor from pressing its claim to a conclusion before the Shipping Board in the first instance, and no delay shown to be attributable to the Shipping Board, or its subsidiary, the Fleet Corporation, and where the delay was wholly due to plaintiff's own actions, the statute of limitations applies.

Same.—Under the provisions of the Act of June 15, 1917, as modified by the Merchant Marine Act of June 5, 1920, the claimant whose property had been requisitioned must first present his claim to the Emergency Fleet Corporation (Shipping Board) for a ruling thereon, but this procedure does not prevent the application of the general statute of limitations applicable to all cases commenced in the Court of Claims.

Same.—The statute of limitations is established to prevent the prosecution of stale claims when the opposing party may not be able properly to contest them on account of the lapse of time.

Same.—If a party who is required to do some preliminary act before commencing suit were permitted to take his own time to complete the act, the effect would be to exempt him from the statute of limitations.

Same.—The courts universally hold that the general principles upon which the statute of limitations is founded must be preserved but circumstances may modify its application.

Same; amended petition.—When a new and different cause of action is set up by an amended petition filed after the statute of limitations has run, the statute applies in the same manner as if no prior petition had been filed.

Counterclaim; fraud.—There was executed on June 10, 1924, by plaintiff's predecessor and by the defendant a general release

covering the matters set up as a basis of defendant's counterclaim. The defendant now contends that this agreement was obtained by fraud and is invalid.

Held: Fraud is not shown by satisfactory evidence and the counterclaim is not sustained.

The Reporter's statement of the case:

Mr. James H. Hayes for the plaintiff. *Mr. W. W. Nottingham* was on the briefs.

Messrs. Arthur Cobb and *Oliver P. M. Brown*, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. On February 14, 1916, Gaston, Williams & Wigmore, Inc., entered into a formal agreement with Great Lakes Engineering Works whereby, for the sum of $470,000 each, the Great Lakes Engineering Works was to construct and build two first-class steel general cargo steamers for ocean service, 386 feet overall, 43′ 9″ beam and 27½′ deep, together with the equipment, nautical instruments, furniture, furnishings, and supplies appropriate therefor, the steamships, when delivered, to be complete and ready for sea excepting only fuel, stores, and crew. The first of the steamers was to be completed at Ecorse, and be ready to be delivered, through the canal, to Montreal "on or before the opening of navigation 1917," the second, at the same places, immediately following the first steamer, in time to enter drydock when the first steamer was floated out.

The purchaser, Gaston, Williams & Wigmore, Inc., assigned this contract to Gaston, Williams & Wigmore Steamship Corporation, and the builder and the assignee agreed to extend the date of delivery to November 15, 1917.

These two steamers were designated "Hull 168" and "Hull 169."

On August 1, 1917, by mutual release, this contract was canceled so far as it related to Hull 168, and on that date a new building agreement was entered into between Great Lakes Engineering Works and Compagnie des Chemins de Fer Algeriens de l'Etat of Paris, France, whereby the builder agreed to complete the construction of Hull 168 for the sum

of $115,750, exclusive of extras, and recognized the other party as owner of the hull. The date set for completion and delivery was on or before November 15, 1917, and the place of delivery Montreal, Canada. Article XVII of the new agreement was as follows:

> It is agreed that in all matters relating to this contract the Purchaser shall be represented by Oriental Navigation Corporation and that all notices from the builder shall be sent to the Purchaser in the care of Oriental Navigation Corporation, 17 Battery Place, New York City.

The agreement was signed by the purchaser: "Compagnie des Chemins de Fer Algerienne de l'Etat, By its agents, Oriental Navigation Corporation, By Philip DeRonde, President."

A copy of the agreement of August 1, 1917, between Great Lakes Engineering Works and the French railway company, relating to Hull 168, is attached to the Second Amended Petition as Exhibit "N" and is made part hereof by reference.

The consideration of $115,750 represented the last two installments of $52,875 each, plus $10,000 as bonus for a new contract.

On July 26, 1917, by mutual release, the building contract of February 14, 1916, as amended and assigned, was canceled so far as it related to Hull 169, and on July 25, 1917, a new building agreement was entered into between Great Lakes Engineering Works and Compagnie des Chemins de Fer de Paris a Lyon et a la Mediterranee of Paris, France, whereby the builder, for the sum of $221,500, exclusive of extras, agreed to complete the construction of Hull 169, and recognized the French railway company as owner of the hull. The date for completion and delivery was set at Montreal, Canada, on or before November 15, 1917. Article XVII of the new contract provided:

> It is agreed that in all matters relating to this contract the Purchaser shall be represented by Oriental Navigation Corporation and that all notices from the Builder shall be sent to the Purchaser in the care of Oriental Navigation Corporation, 17 Battery Place, New York City.

Reporter's Statement of the Case

The purchaser signed the contract: "Compagnie de Chemins de Fer de Paris a Lyon et a la Mediterranee de l'Etat, By its agents, Oriental Navigation Corporation, By Philip DeRonde, President."

The consideration of $221,500.00 represented the last four installments of $52,875.00 each, plus $10,000.00 bonus for agreeing to a new contract.

A copy of this agreement of July 25, 1917, is attached to the Second Amended Petition as plaintiff's Exhibit "Q" and is made part hereof by reference.

Oriental Navigation Corporation was a corporation of the State of New York.

On May 22, 1916, Christoffer Hannevig and Great Lakes Engineering Works entered into a formal agreement whereby the builder, Great Lakes Engineering Works, undertook, for the sum of $330,000.00 to build and construct a first-class steel cargo steamer for ocean service, 261 feet overall, 43′ 6″ beam and 27′ 6″ deep, together with the equipment, nautical instruments, furniture, and supplies appropriate therefor, the steamship, when delivered, to be complete and ready for sea. The steamer was to be completed at Ashtabula and be ready for delivery at the shipyard of the builder on or before September 1, 1917. The steamer was numbered Hull 172.

On July 10, 1917, Great Lakes Engineering Works and Compagnie des Chemins de Fer Algeriens de l'Etat of Paris, France, entered into a building agreement, whereby the builder, Great Lakes Engineering Works, recognized the French railway company as the owner of Hull 172, and agreed to complete the construction of this steamer, the steamer to be completed and ready for delivery at Ashtabula, Ohio, on or before September 1, 1917. The consideration named, exclusive of extras, was $154,000.00. Article XVII of the contract provided:

> It is agreed that in all matters relating to this contract the Purchaser shall be represented by Oriental Navigation Corporation, and that all notices from the Builder shall be sent to the Purchaser in the care of Oriental Navigation Corporation, 17 Battery Place, New York City.

The signature of the purchaser to the contract was as follows: "Compagnie des Chemins de Fer Algerienne de l'Etat, By its Agents, Oriental Navigation Corporation, by Philip DeRonde, President."

The consideration of $154,000.00 consisted of a bonus of $10,000.00 for a new contract, and six unpaid installments of $24,000.00 each.

A copy of this agreement is attached to the Second Amended Petition as plaintiff's Exhibit "G," and is made part hereof by reference.

On May 26, 1916, Christoffer Hannevig and Great Lakes Engineering Works entered into another agreement for a vessel, known as Hull 173, substantially the same as for Hull 172, delivery, however, to be on or before September 30, 1917. A copy of this agreement is attached to the Second Amended Petition as plaintiff's Exhibit "I" and is made part hereof by reference.

On July 16, 1917, Great Lakes Engineering Works and Compagnie des Chemins de Fer Algeriens de l'Etat of Paris, France, entered into a building agreement whereby the builder, Great Lakes Engineering Works, for the sum of $178,000.00, exclusive of extras, agreed to complete Hull 173 for the purchaser, the French railway company, on or before September 30, 1917, at Ashtabula, Ohio, and recognized the French railway company as the owner of the hull.

Article XVII of the contract provided:

> It is agreed that in all matters relating to this contract the Purchaser shall be represented by Oriental Navigation Corporation, and that all notices from the Builder shall be sent to the Purchaser in the care of Oriental Navigation Corporation, 17 Battery Place, New York City.

The purchaser signed the contract: "Compagnie des Chemins de Fer Algerienne de l'Etat, By its Agents, Oriental Navigation Corporation, By James F. Gill, Vice President."

The new consideration of $178,000.00 was made up of a bonus of $10,000.00 for entering into a new agreement, and seven installments of $24,000.00 each then unpaid.

A copy of this contract is attached to the Second Amended Petition as plaintiff's Exhibit "J" and is made part of these findings by reference.

2. On July 11, 1917, the President of the United States, by virtue of the authority vested in him by act of Congress of June 15, 1917, by an Executive order delegated the powers conferred upon him by the said act to the United States Shipping Board Emergency Fleet Corporation, hereinafter called the Fleet Corporation. Under authority so conferred upon it, while the work provided to be done under the contracts for the construction of Hulls 168, 169, 172, and 173 was in progress, the Fleet Corporation on August 4, 1917, sent the Great Lakes Engineering Works the following telegram, which was duly received:

WASHINGTON, D. C., *August 4, 1917*.

GREAT LAKES ENGINEERING WORKS,
Detroit, Mich.

By virtue of an Act approved June 15, 1917, and authority delegated to Emergency Fleet Corporation by Executive Order of July 11, 1917, all power driven ocean going cargo-carrying vessels above twenty-five hundred tons deadweight capacity under construction in your yards and materials, machinery, equipment, and outfit thereto pertaining are hereby requisitioned by the United States and will be completed with all practicable dispatch. Letter follows.

W. L. CAPPS,
General Manager.

On August 23, 1917, the Fleet Corporation sent the following letter, with enclosure "A," to Oriental Navigation Corporation, which was duly received, and similar letters were so sent and received with respect to Hulls 169, 172, and 173.

WASHINGTON, *August 23, 1917*.

ORIENTAL NAVIGATION CORPORATION,
New York City.

DEAR SIRS: On August 3, 1917, the United States Emergency Fleet Corporation issued to the Great Lakes Engineering Works Shipbuilding Company the notice or requisition, set forth in enclosure marked (a).

In response to this communication Great Lakes Engineering Works, the shipbuilders, informed us that you, as owners, or representatives of owners, had entered into a contract with them for the vessels listed below:

Hull No. 168; type, cargo; D. W. ton Approx. 5,500; date of contract, 2–14–16 (Hgw. Agreement), 8–1–17.

The Corporation's District Officer having charge of vessels in the District in which the shipbuilders are located has been instructed to take charge, for the Corporation, of the completion of vessels now under construction, and has been authorized temporarily to take over your local inspecting officers at their present compensation. Will you please inform the District Officer, Mr. C. R. McDermott, at Room 302, 1319 F. St., NW., Washington, D. C., the names of your representatives and their compensation, sending a duplicate to this office. Your cooperation with the Corporation is invited.

The Corporation will consider payments to the Contractor accruing since the date of requisition, upon the receipt of proper vouchers and adequate information to be forwarded through its District Officers.

You are requested, as soon as possible, to report to the Corporation a statement in detail of the payments already made by you on each ship named above prior to the date of the requisitioning, August 3, 1917. This statement should be accompanied by the original vouchers and receipts and should be verified under oath by the proper corporate officer of your company.

It is the present intention of the Corporation to reimburse you promptly, so far as funds are available, for the payments heretofore made to the shipbuilder if after investigation of data submitted by you, such payments are found in order and in conformity with the contract requirements.

At your further and early convenience, you are requested to submit to the Corporation a statement of such indirect expenditures as you have made on account of each vessel, for instance, the cost of superintendence, original design, interest on funds already paid, and the like. The matters mentioned will require careful audit, and in addition you may submit any other matters you deem pertinent.

It will be perceived that the Corporation presumes it is addressing this letter to the Owners, or responsible representatives of the Owners, or persons entitled to receive compensation on account of the requisition

of the vessels listed above. The Corporation requests that there be included in your response to this letter all evidence of ownership which is necessary to establish the right of those who are entitled to receive the compensation provided by law.

The consummation of the orders herein, and heretofore transmitted, will be made the subject of later appropriate corporate action.

Very truly yours,

(Signed) W. L. CAPPS,
General Manager.

Enclosure (1).

WASHINGTON, D. C., *August 23, 1917.*

Enclosure "A."

To Oriental Navigation Corporation,
Re: Great Lakes Engineering Works.

By virtue of an Act of Congress, approved June 15, 1917, entitled "An Act making appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes" and by authority delegated to the United States Shipping Board Emergency Fleet Corporation under Executive Order of the President, dated July 11, 1917, all power-driven cargo-carrying and passenger ships, above 2,500 tons d. w. capacity, under construction in your yard and certain materials, machinery, equipment, outfit, and commitments for materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States.

On behalf of the United States, by virtue of said Act and said Order, you are hereby required to complete the construction of said requisitioned ships under construction and will prosecute such work with all practicable dispatch.

The compensation to be paid will be determined hereafter and will include ships, material, and contracts requisitioned.

You will furnish immediately general plans and detail specifications of the ships requisitioned, and copies of contracts and all supplemental agreements in relation thereto, and full particulars as to owner, date of completion, payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and contracts.

You will report immediately whether any additional contracts are under consideration and their character and extent, and will not enter into any additional contracts or commitments with respect to merchant tonnage without express authority from this Corporation.

(Signed) W. L. CAPPS,
General Manager, United States Shipping Board Emergency Fleet Corporation.

WASHINGTON, D. C., *August 3, 1917*

The ships referred to in the foregoing telegram and letter included Hulls 168, 169, 172, and 173 under construction in the yards of Great Lakes Engineering Works, and the contracts referred to therein included the contracts for the construction of these ships.

Hulls 168 and 169 were of 5,500 tons dead-weight capacity each, and Hulls 172 and 173 of 4,300 tons dead-weight capacity each.

At or around the time of requisition Hull 168 was about 95% complete; Hull 169, 93½%; Hull 172, 90%; and Hull 173, 90%.

On September 12, 1917, the Fleet Corporation by letter instructed Great Lake Engineering Works as follows:

> You will proceed with the completion of Hulls Nos. 168, 169, and 172 to 193, both inclusive, to meet the requirements of the contract under which these ships were being constructed by you for other parties on August 3d, 1917.
>
> As just compensation for, and as the reasonable price of such completion, the Corporation will pay to you sums equivalent to the amounts which were unpaid on the said contracts on August 3d, 1917. Such payments will be made upon receipt of vouchers submitted through the District Officer to this Corporation on the forms to be forwarded to you after certification by the District Officer that such payments are due and warranted.
>
> The District Officer will be instructed to continue the inspection of work and material to insure that the vessel, when completed, will be equal in all respects to what was contemplated by the requirements of the contract in force on August 3, 1917, and you will provide the District Officer and his representatives all facilities necessary for the performance of this duty.

3. The construction of all four vessels was completed by the Great Lakes Engineering Works.

Hull 168 was delivered to the United States Shipping Board, hereinafter referred to as the Shipping Board, October 24, 1917, at Montreal. She sailed from Montreal October 28, 1917, and arrived at New York November 8, 1917.

Hull 169 was delivered to the Shipping Board December 1, 1917, at Montreal. She sailed from Montreal December 2, 1917, and arrived at New York December 16, 1917.

Hull 172 was delivered to the Shipping Board October 25, 1917, at Ashtabula. She sailed from Ashtabula November 2, 1917, and after calling at several ports arrived at New York December 21, 1917.

Hull 173 was delivered to the Shipping Board November 15, 1917, at Ashtabula. She sailed from Ashtabula November 17, 1917, and after calling at several ports arrived at New York December 17, 1917.

4. On Hull 168 Great Lakes Engineering Works, constructor, on the contract price of $470,000.00, plus extras amounting to $7,625.00, a total of $477,625.00, received from the Fleet Corporation the last installment, $52,875.00, plus extras of $7,625.00, total $60,500.00, and the balance of $417,125.00 was paid to the constructor by others, $52,875.00 by Oriental Navigation Corporation, and $364,250.00 by those holding the building contract prior to the new contract of August 1, 1917, between the constructor and the French railway company. In addition, Oriental Navigation Corporation paid the constructor $10,000.00 as consideration additional to that named in the original building contract.

To Gaston, Williams & Wigmore S. S. Corp., Oriental Navigation Corporation paid $1,403,182.11 for the building contract, a total payment by Oriental Navigation Corporation to Great Lakes Engineering Works and Gaston, Williams & Wigmore S. S. Corp. of $1,466,057.11.

For the payment of $1,466,057.11, Oriental Navigation Corporation received an equal or greater sum from Compagnie des Chemins de Fer Algeriens de l'Etat, on or about the dates thereof.

In addition to $1,466,057.11 paid to Gaston, Williams & Wigmore S. S. Corp. and the constructor, Oriental Navi-

gation Corporation paid out for incidentals, such as for fees, commissions, insurance, superintendence, the sum of $58,194.19, a total of $1,524,251.30.

On Hull 169, Great Lakes Engineering Works, constructor, on the contract price of $470,000.00, plus extras of $7,625.00, a total of $477,625.00, received from the Fleet Corporation $113,375.00, being the last two installments of $52,875.00 each, plus $7,625.00 for extras. The balance of $364,250.00 was paid to the constructor by others, $105,750.00 by Oriental Navigation Corporation, and $258,500.00 by those holding the building contract prior to the new contract of July 25, 1917, between the constructor and the French railway company. In addition, Oriental Navigation Corporation paid the constructor $10,000.00 as consideration additional to that named in the original building contract.

To Gaston, Williams & Wigmore S. S. Corp., Oriental Navigation Corporation paid $1,279,887.50 for the building contract, a total payment by Oriental Navigation Corporation to Great Lakes Engineering Works and Gaston, Williams & Wigmore S. S. Corp. of $1,395,637.50.

For the payment of $1,395,637.50 Oriental Navigation corporation received an equal or greater sum from Compagnie des Chemins de Fer de Paris a Lyon et a la Mediterranee, on or about the dates thereof.

In addition to $1,395,637.50 paid to Gaston, Williams & Wigmore S. S. Corp. and the constructor, Oriental Navigation Corporation paid out for incidentals, such as for fees, commissions, insurance, and superintendence, the sum of $62,-732.71, a total of $1,458,370.21.

On Hull 172, Great Lakes Engineering Works, constructor, on the contract price of $330,000.00, plus extras of $3,-600.00, a total of $333,600.00, received from the Fleet Corporation the last two installments of $24,000.00 each, total $48,000.00, plus $3,600.00 for extras, an aggregate of $51,-600.00, and the balance of $282,000.00 was paid to the constructor by others, $96,000.00 by Oriental Navigation Corporation, and $186,000.00 by those holding the building contract prior to the new contract of July 10, 1917, between

the constructor and the French railway company. In addition, Oriental Navigation Corporation paid to the constructor $10,000.00 as consideration additional to that named in the original contract.

To Christoffer Hannevig, Oriental Navigation Corporation paid $754,200.00 for the building contract, a total payment by Oriental Navigation Corporation to Great Lakes Engineering Works and Christoffer Hannevig of $860,200.00.

For the payment of $860,200.00 Oriental Navigation Corporation received an equal or greater sum from Compagnie des Chemins de Fer Algeriens de l'Etat on or about the dates thereof.

In addition to $860,200.00 paid to Hannevig and the constructor, Oriental Navigation Corporation paid out for incidentals, such as for fees, commissions, insurance, and superintendence, the sum of $92,276.89, a total of $952,476.89.

On Hull 173, Great Lakes Engineering Works, on the contract price of $330,000.00, plus extras of $3,600.00, a total of $333,600.00, received from the Fleet Corporation $120,000.00, plus $3,600.00, an aggregate of $123,600.00, and the balance of $210,000.00 was paid to the constructor by others, $48,000.00 by Oriental Navigation Corporation, and $162,000.00 by those holding the building contract prior to the new contract of July 16, 1917, between the constructor and the French railway company. In addition, Oriental Navigation Corporation paid to the constructor $10,000.00 as consideration additional to that named in the original contract.

To Christoffer Hannevig, Oriental Navigation Corporation paid $730,200.00 for the building contract, a total payment by Oriental Navigation Corporation to Great Lakes Engineering Works and Christoffer Hannevig of $788,200.00.

For the payment of $788,200.00 Oriental Navigation Corporation received an equal or greater sum from Compagnie des Chemins de Fer Algeriens de l'Etat on or about the dates thereof.

In addition to $788,200.00 paid to Hannevig and the constructor, Oriental Navigation Corporation paid out for incidentals, such as for fees, commissions, insurance, and superintendence, the sum of $92,263.17, a total of $880,463.17.

5. On or about October 23, 1917, Oriental Navigation Corporation presented to the Fleet Corporation as in account with "Oriental Navigation Corporation for itself and as agents for Compagnie des Chemins de Fer Algeriens de l'Etat," two claims for the taking with respect to Hull 168, one for $1,547,347.38 as agent for the French railway company, and another for $148,775.00 for itself. These claims were set up as follows:

NEW YORK, *October 22nd, 1917.*

UNITED STATES EMERGENCY FLEET CORPORATION, WASHINGTON, D. C.

In Account With

ORIENTAL NAVIGATION CORPORATION FOR ITSELF AND AS AGENTS FOR COMPAGNIE DES CHEMINS DE FER ALGERIENS DE L'ETAT

S. S. *Souk Ahras* (Hull 168)—Great Lakes Engineering Works, Ecorse

1917		
July 25—To Gaston, Williams & Wigmore: Initial Payment Account Purchase Building Contract		$200,000.00
Aug. 1—To Gaston, Williams & Wigmore: Final Payment Account Purchase Building Contract		1,203,182.11
Aug. 6—To Great Lakes Engineering Works: Payment on Signing New Contract		10,000.00
Aug. 13—To Great Lakes Engineering Works: Installment due upon installation of Engines		52,875.00
Aug. 16—To Brokerages Paid Account Purchase		38,749.99
To Insurance Premium: On Excess Builder's Risk, Including Launching		1,113.57
To Insurance Premium: Risk from Ashtabula to Montreal while cut and until rejoined	$21,115.11	
Less Proportion, Account Builders, as per contract	5,000.00	
		16,115.11
To C. S. Hawkins: Salary and Expenses, Superintending Building		389.65

Reporter's Statement of the Case

To Master:		
Attending Vessel while Building	$762.94	
Railroad fare to join vessel	20.05	
		$782.99
To Chief Engineer:		
Attending Vessel while Building	280.45	
Railroad fare to join vessel	14.52	
		294.97
To Duncan & Mount:		
Legal Fees	500.00	
To Legal Expenses	31.20	
To Legal Expenses	6.00	
		537.20
To Cabling Expenses		210.71
		1,524,251.30
To Interest on payments made, as carried out above, to Oct. 31, 1917		23,096.08
		1,547,347.38

PROFORMA VOYAGE ACCOUNT

S. S. *Souk Ahras*—New York to Havre—Total D. W. 5,500 tons

5,500 tons
1,250 tons Bunker coal, stores, water, etc.

4,250 tons Deadweight available for cargo.

40% of available capacity for French Government Cargo:		
1,700 tons at $35.00		$59,500.00
Balance for General Shippers:		
2,550 tons at $100.00		255,000.00
Gross Freight		314,500.00
Expenses:		
Marine Insurance—$1,500,000 at 2%	$30,000	
War Insurance—$1,500,000 at 5%	75,000	
Port chgs. loading and discharging	25,000	
Coal and Stores	10,000	
Crew's wages, insurance, and repatriation to U. S.	10,000	
Loading Brokerage	15,725	
		165,725.00
Estimated Profit		148,775.00

NEW YORK, *October 20th, 1917.*

Reporter's Statement of the Case

On or about November 5, 1917, Oriental Navigation Corporation presented to the Fleet Corporation as in account with "Oriental Navigation Corporation for itself and as agents for Chemins de Fer de Paris a Lyon et a la Mediterranee" two claims for the taking with respect to Hull 169, one for $1,485,804.48 as agent for the French railway company, and another for $148,775.00 for itself. These claims were set up as follows:

NEW YORK, *November 3rd, 1917.*

UNITED STATES EMERGENCY FLEET CORPORATION, WASHINGTON, D. C.

In Account With

ORIENTAL NAVIGATION CORPORATION FOR ITSELF AND AS AGENTS FOR CHEMINS DE FER DE PARIS A LYON ET A LA MEDITERRANEE

S. S. *S. N. A. #4* (Hull 169)—Great Lakes Engineering Works, Ecorse

1917	
July 18—To Gaston, Williams & Wigmore Steamship Corp.: Initial Payment Account Purchase Building Contract	$200,000.00
July 25—To Gaston, Williams & Wigmore Steamship Corp.: Further Payment Account Purchase Building Contract	250,000.00
July 25—To Gaston, Williams & Wigmore Steamship Corp.: Final Payment Account Purchase Building Contract	829,887.50
July 27—To Great Lakes Engineering Works: Payment on signing New Contract	10,000.00
Aug. 13—To Great Lakes Engineering Works: Installment due when Engines ready	52,875.00
Aug. 29—To Great Lakes Engineering Works: Installment due when Engines and Boilers installed	52,875.00
Aug. 16—To Brokerages Paid Account Purchase	38,750.01
To Insurance Premium: On Excess Builder's Risk, including Launching	1,134.05
To Insurance Premium: Risk from Ashtabula to Montreal while cut and until rejoined	21,543.86

To C. S. Hawkins:		
Salary and Expenses superintending Building		481.07
To Chief Engineer:		
Attending vessel while building, Oct. 8th to 15th, inc., 8 days at $15 per day	$120.00	
Railroad fare to join vessel	20.75	
		$140.75
To Duncan & Mount:		
Legal Fees		500.00
To Cabling Expenses		182.97
		1,458,370.21
To Interest on payments made, as carried out above, to Nov. 20th/17		27,434.27
		1,485,804.48

PROFORMA VOYAGE ACCOUNT

S. S. *S. N. A. No. 4*—New York to Havre—Total D. W. 5,500 tons

5,500 tons
1,250 tons Bunker coal, stores, water, etc.

4,250 tons Deadweight available for cargo.

40% of available capacity for French Government Cargo:		
1,700 tons at $35.00		$59,500.00
Balance for General Shippers:		
2,550 tons at $100.00		255,000.00
Gross freight		314,500.00
Expenses:		
Marine Insurance—$1,500,000 at 2%	$30,000	
War Insurance—$1,500,000 at 5%	75,000	
Port chgs. Loading and Discharging	25,000	
Coal and Stores	10,000	
Crew's wages, insurance, and repatriation to U. S.	10,000	
Loading Brokerage	15,725	
		165,725.00
Estimated Profit		148,775.00

NEW YORK, *November 1st, 1917.*

On or about November 5, 1917, Oriental Navigation Corporation presented to the Fleet Corporation as in account with "Oriental Navigation Corporation for itself and as agents for Compagnie des Chemins de Fer Algeriens de l'Etat" two claims for the taking with respect to Hull 172, one for $975,067.15 as agent for the French railway company, and another for $131,005.00 for itself. These claims were set up as follows:

NEW YORK, *November 3rd, 1917.*

UNITED STATES EMERGENCY FLEET CORPORATION, WASHINGTON, D. C.

In Account With

ORIENTAL NAVIGATION CORPORATION FOR ITSELF AND AS AGENTS FOR COMPAGNIE DES CHEMINS DE FER ALGERIENS DE L'ETAT

S. S. *Sidi Mabrouk* (Hull 172)—Great Lakes Engineering Works, Ashtabula

1917		
May 31	To Christoffer Hannevig, Inc.: Initial Payment Account Purchase Building Contract	$90, 000. 00
June 9	To Christoffer Hannevig, Inc.: Further Payment Account Purchase Building Contract	62, 500. 00
June 11	To Christoffer Hannevig, Inc.: Through National Bank of Commerce, Final Payment Account Purchase Building Contract	601, 700. 00
June 28	To Great Lakes Engineering Works: Payment on signing new Contract	10, 000. 00
July 12	To Great Lakes Engineering Works: Installment due upon completion of Plating	24, 000. 00
July 28	To Great Lakes Engineering Works: Installment due when ship launched	24, 000. 00
Aug. 28	To Great Lakes Engineering Works: Installment due when Engines and Boilers ready	24, 000. 00
Aug. 28	To Great Lakes Engineering Works: Installment due when Boilers installed	24, 000. 00
July 10	To Brokerages Paid Account Purchase	90, 000. 00
	To Insurance Premium on Excess Builder's Risk	1, 180. 98

Reporter's Statement of the Case

To C. S. Hawkins:	
Salary and Expenses Superintending Building	601.63
To Duncan & Mount:	
Legal Fees	375.00
To National Bank of Commerce:	
Certification Fee	$8.00
To Cabling Expenses	111.28
	952,476.89
To Interest on payments made, as carried out above, to Nov. 20th/17	22,590.26
	975,067.15

PROFORMA VOYAGE ACCOUNT

S. S. *Sidi Mabrouk*—New York to Bordeaux—Total D. W. 4,300 tons

4,300 tons
950 tons Bunker coal, stores, water, etc.

3,350 tons Deadweight available for cargo.

40% of available capacity for French Government Cargo:		
1,340 tons at $35.00		$46,900.00
Balance for General Shippers:		
2,010 tons at $100.00		201,000.00
3,350 tons Gross Freight		247,900.00
Expenses:		
Marine Insurance $1,000,000 at 2%	$20,000	
War Risk Insurance $1,000,000 at 5%	50,000	
Port chgs., loading, and Discharging	17,000	
Coal and Stores	7,500	
Crew's wages, insurance, and repatriation to U. S.	10,000	
Loading Brokerage	12,395	
		116,895.00
Estimated Profit		131,005.00

NEW YORK, *November 1st, 1917.*

On or about November 5, 1917, Oriental Navigation Corporation presented to the Fleet Corporation as in account with "Oriental Navigation Corporation for itself and as

agents for Compagnie des Chemins de Fer Algeriens de l'Etat," two claims for the taking with respect to Hull 173, one for $901,587.43 as agent for the French railway company, and another for $131,005.00 for itself. These claims were set up as follows:

NEW YORK, *November 3rd, 1917.*

UNITED STATES EMERGENCY FLEET CORPORATION, WASHINGTON, D. C.

In Account With

ORIENTAL NAVIGATION CORPORATION FOR ITSELF AND AS AGENTS FOR COMPAGNIE DES CHEMINS DE FER ALGERIENS DE L'ETAT

S. S. *Perregaux* (Hull 173)—Great Lakes Engineering Works, Ashtabula

1917	
May 31—To Christoffer Hannevig, Inc.: Initial Payment Account Purchase Building Contract	$90,000.00
June 9—To Christoffer Hannevig, Inc.: Further Payment Account Purchase Building Contract	62,500.00
June 11—To Christoffer Hannevig, Inc.: Through National Bank of Commerce Final Payment Account Purchase Building Contract	577,700.00
July 16—To Great Lakes Engineering Works: Payment on signing New Contract	10,000.00
July 12—To Great Lakes Engineering Works: Installment due when Plating 50% Advanced	24,000.00
Aug. 23—To Great Lakes Engineering Works: Installment due when Plating completed	24,000.00
July 16—To Brokerages Paid Account Purchase	90,000.00
To Insurance Premium: On Excess Builder's Risk	1,180.98
To C. S. Hawkins: Salary and Expenses Superintending Building	595.89
To Duncan & Mount: Legal Fees	375.00
To Cabling Expenses	111.30
	880,463.17
To Interest on payments made, as carried out above, to Nov. 20th/17	21,124.26
	901,587.43

Reporter's Statement of the Case

PROFORMA VOYAGE ACCOUNT

S. S. *Perregaux*—New York to Bordeaux—Total D. W. 4,300 tons

4,300 tons.		
950 tons Bunker coal, stores, water, etc.		
3,350 tons Deadweight available for cargo.		
40% of available capacity for French Government Cargo:		
1,340 tons at $35.00		$46,900.00
Balance for General Shippers:		
2,010 tons at $100.00		201,000.00
3,350 tons Gross Freight		247,900.00
Expenses:		
Marine Insurance, $1,000,000 at 2%	$20,000	
War Risk Insurance, $1,000,000, at 5%	50,000	
Port chgs. Loading & Discharging	17,000	
Coal & Stores	7,500	
Crew's wages, insurance, and repatriation to U. S.	10,000	
Loading Brokerage	12,395	
		116,895.00
Estimated Profit		131,005.00

NEW YORK, *November 1st, 1917.*

6. While the claims of the two French railway companies were being investigated and considered by the Fleet Corporation, the Fleet Corporation made certain payments to them, through the French High Commissioner in the United States, to apply on the claims, conditioned upon repayment in whole or in part upon an adverse finding by the Fleet Corporation. These provisional payments were as follows:

(1) January 4, 1918, on Hulls 168, 172, and 173, for Compagnie des Chemins de Fer Algeriens de l'Etat	$1,500,000.00
(2) January 25, 1918, on Hull 169, for Compagnie des Chemins de Fer de Paris a Lyon et a la Mediterranee	500,000.00
(3) February 7, 1918, on Hulls 168, 172, and 173, for Compagnie des Chemins de Fer Algeriens de l'Etat	500,000.00
(4) February 7, 1918, on Hull 169, for Compagnie des Chemins de Fer de Paris a Lyon et a la Mediterranee	500,000.00

making a total provisional payment on Hulls 168, 172, and 173 of $2,000,000.00 and on Hull 169, $1,000,000.00.

7. By letter dated March 18, 1918, Oriental Navigation Corporation made the following statement to the Shipping Board:

> Lest there be any imputation of incorrect procedure on the part of the said Oriental Navigation Co., i. e., an attempt to prosecute their claims for compensation to the detriment of the French principals' claims for reimbursement, we desire to place on record with the Shipping Board our many times repeated verbal assertion—That we shall not push, prosecute, argue, or discuss the said claim for compensation in any shape or manner whatsoever until such time as verification and settlement has been made by the Board of the Claim of our French principals for reimbursement.

Thereafter on or about July 25, 1918, the Fleet Corporation received from the president of Oriental Navigation Corporation the following request with reference to Hulls 168, 169, 172, and 173:

> I would refer you to my several letters of March 18th and 22nd and April 6th on the question of compensation of the Oriental Navigation Co., of New York, in connection with the requisition by the United States Government of the above named steamers.
>
> Since the said letters were written the position has changed. I have requested of the French railway companies that my company and I be relieved from any further prosecution of their several claims for reimbursement, at the same time indicating my desire and intention of cooperating with the French Commission or such other French Government agency as may later be entrusted with the prosecution of the said claims.
>
> During the time that I personally carried the matter on behalf of the railways, I did not feel it compatible with my dual position to take any steps toward the prosecution of the claim of my own company. Inasmuch as I no longer occupy this dual position, I now feel free to request the Board's prompt consideration of the said claims of the Oriental Navigation Co., amounting in all to $559,560.00.
>
> Statements with supporting documents covering the entire affair are already in your hands. I would be glad to provide further details, if requested, or to personally appear before the Shipping Board should this appear desirable.

8. On January 14, 1920, Oriental Navigation Corporation by an instrument in writing sold and conveyed to Oriental Navigation Company, incorporated under the laws of the State of Delaware, January 9, 1920, its successors and assigns, "the business now conducted by said Oriental Navigation Corporation at No. 39 Broadway, Borough of Manhattan, City of New York, including the good will thereof, lease, fixtures and appurtenances, outstanding accounts, and each and everything used therein by said Oriental Navigation Corporation as of the first day of January 1920."

Oriental Navigation Corporation was dissolved March 27, 1920, and thereupon ceased to exist.

9. The Fleet Corporation proceeded to consider the claims of Oriental Navigation Corporation, and on May 8, 1923, Oriental Navigation Company advised the Fleet Corporation by letter as follows:

> Colonel JOSEPH FAIRBANKS,
> *Assistant General Counsel in Charge of Claims,*
> *United States Shipping Board Emergency*
> *Fleet Corporation,*
> *Washington, D. C.*
>
> SIR: Claims filed by the Oriental Navigation Company, New York, N. Y., on or about November 5, 1917, with the United States Shipping Board Emergency Fleet Corporation for recovery of loss sustained by said Company arising out of the requisition by the United States on or about August 3, 1917, of four steel screw steamships, namely, the *Sidi Mabrouk, Perregaux, S. N. A.*, and the *Souk Ahras*, known as builder's hull No. 172, No. 173, No. 169, and No. 168, respectively, are hereby withdrawn, without prejudice and without waiving any right, title, or interest that the said Oriental Navigation Company now has or may have in the premises and the Oriental Navigation Company specifically reserves the right to intervene and/or take such other action as may be deemed necessary or advisable to maintain or protect its interests, including actions in law or suits in equity.
>
> It is understood that such withdrawal refers only to claims of the Oriental Navigation Company above stated and in no sense is to be considered as a withdrawal of claims by Compagnie des Chemins de fer Algeriens de l'Etat or by the Compagnie des Chemins

de fer de Paris a Lyon et a La Mediteranee, as presented by said Oriental Navigation Company as agent. It is further understood that such withdrawal does not waive and in no sense is to be considered as waiving any right in the premises that the Oriental Navigation Company now has or may have as against said railways or any other party.

Respectfully submitted.

ORIENTAL NAVIGATION COMPANY,
By (Signed) FRANK S. DE RONDE,
Assistant to the President.

To this the Fleet Corporation replied May 10, 1923:

ORIENTAL NAVIGATION CO.,
17 Battery Place, New York City.
Attention: Mr. Frank S. De Ronde.
Subject: Claims arising out of requisition of S. S. *Sidi Mabrouk*, *Perregaux*, *S. N. A.*, and *Souk Ahras*—Serial R. C. 11.

GENTLEMEN: I have your letter of May 8th, withdrawing claims filed by the Oriental Navigation Company, account requisition of the above-mentioned steamers, "without prejudice and without waiving any right, title, or interest that the said Oriental Navigation Company now has or may have in the premises and the Oriental Navigation Company specifically reserves the right to intervene and/or take such other action as may be deemed necessary or advisable to maintain or protect its interests, including actions in law or suits in equity."

We have accordingly eliminated these claims from our docket, it being understood, of course, that we are not by such action waiving any rights now possessed by the E. F. C. or conferring any additional rights on your company.

Very truly yours,
JOSEPH FAIRBANKS,
Assistant General Counsel,
United States Shipping Board Emergency Fleet Corporation.

ALL: MS.
EHVF: AA.

10. On July 2, 1923, Oriental Navigation Company, by an instrument in writing, sold and conveyed to The Oriental Navigation Company, also a corporation of the State of Delaware, its successors and assigns, "the business now con-

ducted by said Oriental Navigation Company at 17 Battery Place, Borough of Manhattan, City of New York, including the goodwill thereof, all leaseholds, fixtures and appurtenances, all accounts and bills receivable, and all property of every character and description owned by said Oriental Navigation Company as of the 30th day of June 1923, subject, however, to all indebtedness and liabilities of said Oriental Navigation Company as of said date which liabilities and indebtedness are hereby assumed by The Oriental Navigation Company."

The Oriental Navigation Company had been incorporated March 27, 1923, and its name was distinguished from that of the assignor, Oriental Navigation Company, by the definite article "The."

11. The claims of the French railway companies not having been settled by the Fleet Corporation or the defendant, Compagnie des Chemins de Fer Algeriens de l'Etat July 28, 1923, and April 30, 1926, filed, respectively, in this Court, an original and an amended petition, which were given docket No. C–928, claiming a balance due on Hulls 168, 172, and 173 of $2,203,000.00, with interest; and Compagnie des Chemins de Fer de Paris a Lyon et a la Mediterranee August 1, 1923, filed its petition, which was given docket No. C–929, claiming a balance due on Hull 169 of $716,224, with interest.

12. The corporation, Oriental Navigation Company, became inoperative and void March 17, 1926, and was proclaimed by the Governor of the State of Delaware in January 1927, for nonpayment of taxes.

13. On July 26, 1926, Compagnie des Chemins de Fer de Paris a Lyon et a la Mediterranee and Compagnie des Chemins de Fer Algeriens de l'Etat and the defendant entered into an agreement under which the two French railway companies jointly and severally agreed to accept $1,100,000.00 in full settlement of all claims arising out of the requisition of Hulls 168, 169, 172, and 173, and to withdraw their suits then pending in this Court. The agreement does not disclose how the sum of $1,100,000.00 was computed.

14. The French railway companies thereafter duly filed their motions to dismiss, pursuant to the settlement agreement.

On September 22, 1926, The Oriental Navigation Company filed a motion for leave to intervene in case C-928, and also, on that date, a motion in opposition to the plaintiff's motion to dismiss. On October 18, 1926, the petition in case C-928 was dismissed by the Court and the motion to intervene was denied.

On October 11, 1926, The Oriental Navigation Company filed a motion for leave to intervene in case C-929, and also, on that date, a motion in opposition to the plaintiff's motion to dismiss. On October 18, 1926, the petition in case C-929 was dismissed by the Court and the motion to intervene was denied.

15. On August 26, 1929, The Oriental Navigation Company, by its attorney, by letter petitioned the Shipping Board "to resume consideration" of the claims originally filed by Oriental Navigation Corporation, the documents of which were still in the files of the Fleet Corporation, or its successor, the United States Shipping Board Merchant Fleet Corporation.

After some correspondence the Merchant Fleet Corporation granted a hearing on the claims. The claims were referred to a committee on claims, United States Shipping Board, which on November 15, 1929, reported to the Shipping Board its conclusion as follows:

> While it does not appear that either the Shipping Board or the Fleet Corporation ever took formal action on the separate claims of Oriental Navigation Company, it is our recommendation that the Board decline to resume consideration of this claim, more than six years having elapsed since it was withdrawn, and more than twelve years having elapsed since the claim originated.

In proceedings of the Shipping Board, January 15, 1930, the following resolution was adopted by the Board:

> *Resolved*, That the United States Shipping Board decline to resume consideration of the claim of Oriental Navigation Company, and that the General Counsel be directed to notify them accordingly.

The next day, January 16, 1930, a copy of this resolution was transmitted to the attorney for The Oriental Navigation Company.

16. On February 18, 1930, by agreement dated December 18, 1929, The Oriental Navigation Company was merged and consolidated with Dawnic Steamship Corporation, a corporation of the State of Delaware, plaintiff herein, by the terms of which agreement Dawnic Steamship Corporation continued its existence and The Oriental Navigation Company ceased to exist. Plaintiff was thereby "vested with all the property of The Oriental Navigation Company, subject to the outstanding indebtedness and current liabilities, if any, of The Oriental Navigation Company."

A certified copy of the agreement is attached to the Second Amended Petition as plaintiff's Exhibit "C" and is made part hereof by reference.

17. Plaintiff filed its petition in this case April 23, 1930.

18. During the year 1917 shipyards in the United States were actively engaged in the construction of ships for the prosecution of the war. The two French railway companies, heretofore referred to, were in the market for them, and Oriental Navigation Corporation was then engaged in the steamship business, running a regular line to France, owning, buying, selling steamers, and operating steamers.

Oriental Navigation Corporation was on the lookout for completed or partially completed vessels, which they could purchase and resell at a profit either for themselves or for others. They had general agents in France, operating under a name similar to their own.

Through the French agents Oriental Navigation Corporation made certain contacts with the French railway companies, whereby Oriental Navigation Corporation made known to the French railway companies the possibility of purchasing the steamships here involved, viz. Hulls 168, 169, 172, and 173. Negotiations with the holders of the building contracts, or options thereon, which were assignable, negotiations with the French railway companies, or with the several agents of all concerned, and negotiations among the intermediaries, and with financial interests, were numerous, and owing to the necessities of the situation, such as the scarcity of ships, the great demand for them and time limitations on options, intense and rapid.

Ships brokers and purchasing, negotiating, and selling agents were not, during the period involved, generally reducing their agreements to formal written instruments. Correspondence in this case, looking to the acquirement by the French railway companies of Hulls 168, 169, 172, and 173, was conducted largely by wire, telephone, or trans-Atlantic cable.

Financing of the deals whereby the French railway companies were to acquire Hulls 168, 169, 172, and 173 was done by the French railway companies, and not by Oriental Navigation Corporation.

By the terms of Oriental Navigation Corporation's several agreements with the two French railway companies, the ships were to be delivered to the French railway companies, by Oriental Navigation Corporation, at a French port, and as entire compensation for all services in connection with purchase and delivery, including superintendence of completion of the building, expense of voyage from the Great Lakes to New York, loading at New York of general goods on the berth, expense of crew to a French port and their return to New York, and insurance against war risks and maritime insurance, Oriental Navigation Corporation was to retain the freight from New York to France, less a bonus from Oriental Navigation Corporation to the French railway companies of 100,000 francs, per steamer, payable at time of departure from New York on Hulls 168, 172, and 173, there being no provision for such a bonus on Hull 169. In general, the agreements were that the ships were to be delivered at a French port free of expense to the French railway companies, aside from their purchase price, Oriental Navigation Corporation to take the profit, or bear the loss, on the voyages from Great Lakes, via New York, to France.

19. Had the four vessels been delivered to the French railway companies according to their several arrangements with Oriental Navigation Corporation, and not been requisitioned by the United States, their voyages from Great Lakes to New York would probably have been without profit or loss to Oriental Navigation Corporation.

The voyages from New York would have been profitable.

The probable profits on the voyages to France of Hulls 168, 169, 172, and 173, after deducting the costs and expenses

that were not to be borne by the French railway companies under their agreements with Oriental Navigation Corporation, were as follows:

Hull 168	$100,000.00
" 169	117,500.00
" 172	104,000.00
" 173	104,000.00
Total	425,500.00

On and before August 3, 1917, and afterwards, the increased production of ships for the prosecution of the war was an urgent necessity.

In 1916 and 1917 contracts were made with American shipyards for construction of ships for citizens of the United States and citizens and subjects of other nations. Beginning early in 1916 and continuing until August 3, 1917, such contracts were the subject of free and ready sale and were frequently transferred from the original owners to assignees and by the first and later assignees to subsequent assignees. There was an active demand for such contracts. The market value of these contracts continually rose during this period. The time of greatest market activity was in March and April 1917.

The four contracts expropriated by the defendant August 3, 1917, had a fair market value at that time of $275 per dead-weight ton.

20. By reason of the expropriation by the defendant August 3, 1917, of Hulls 168, 169, 172, and 173, and of the building contracts therefor, Oriental Navigation Corporation was unable to complete the performance of its contracts with the two French railway companies.

Neither Oriental Navigation Corporation nor any of its successors in interest have been paid by the defendant any compensation for the service it performed or agreed to perform.

Additional Findings Pertaining to Counterclaim

21. During the years 1918 and 1919 Oriental Navigation Corporation was employed by the Fleet Corporation to manage and operate, and did manage and operate for defendant's

account, certain merchant vessels then controlled by the Shipping Board. The terms and conditions of such employment are set forth in written managing and operating agency agreements designated, respectively, Form M-2 and Form O-2.

A true copy of the Form M-2 agreement and a true copy of the Form O-2 agreement, providing for the management and operation of the steamship *Innoko* and other vessels, similar in form to all of the other agreements mentioned in this finding, are annexed to defendant's second amended further answer and counterclaim, marked "Exhibits A and B," respectively, and by reference made a part hereof.

22. Beginning at the time Oriental Navigation Company succeeded to the business of Oriental Navigation Corporation, that is, in the fore part of January 1920, and continuing to February 3, 1922, Oriental Navigation Company managed and operated certain merchant vessels for defendant's account pursuant to the terms and conditions of said M-2 and O-2 agency agreements, and managed and operated certain other merchant vessels for defendant's account pursuant to a certain agency agreement, executed by the Fleet Corporation, acting for defendant, and by Oriental Navigation Company on December 22, 1920, designated as Form MO-4, which agency agreement was in express terms made retroactive to March 1, 1920. This MO-4 agency agreement was thereafter amended by an addendum thereto, executed by the parties, dated July 19, 1921.

Copies of the MO-4 agreement and of the addendum thereto are attached to defendant's second amended further answer and counterclaim as "Exhibits C and D," respectively, and are made part hereof by reference.

23. The Shipping Board and Fleet Corporation, with respect to these agency agreements, recognized Oriental Navigation Company as the corporate successor of Oriental Navigation Corporation, and no new agreements were entered into with Oriental Navigation Company because of the cessation of business by Oriental Navigation Corporation or its dissolution.

Reporter's Statement of the Case

24. Oriental Navigation Corporation and Oriental Navigation Company in the performance of their services as agents under these agreements appointed and employed, pursuant to the agreements, Dodero Hermanos, Lda., of Argentine, to handle the business of defendant's merchant vessels at the port of Buenos Aires and other South American ports, assigned for management and operation under these agreements, and Dodero Hermanos, Lda., performed the services required by the terms of their appointment and employment.

This appointment and employment was never disapproved by the Fleet Corporation.

25. For the services performed by Dodero Hermanos, Lda., there became due them certain commissions, to be paid them by the Fleet Corporation through Oriental Navigation Corporation, Oriental Navigation Company, or The Oriental Navigation Company, as the case might be. (These three companies, any or all of them, are at times referred to hereinafter, for the sake of brevity, as "Oriental.") In accounting with Oriental for the collections which they had made of freight charges, Dodero Hermanos, Lda., withheld the monies which they claimed were due them thereon as commissions.

The amount of these commissions was a matter of dispute for several years beginning early in the performance of the agency contracts, between Oriental and Dodero Hermanos, Lda., and between Oriental and the Fleet Corporation. Oriental was endeavoring to adjust the matter with Dodero Hermanos, Lda., in accordance with the Fleet Corporation's contentions, and at the same time taking a defensive position directly with the Fleet Corporation, presenting thereto the point of view taken by Dodero Hermanos, Lda.

The method used by Dodero Hermanos, Lda., in the calculation of their commissions was as follows:

They based their calculation on the amount of freight as manifested or booked in French francs or English pounds, as the case might be. The francs were first converted into Argentine gold at the rate of 5 francs to the Argentine gold dollar, and the pounds at a rate of 5.04 Argentine gold dollars

to the pound. To the amount of Argentine gold dollars so determined Dodero Hermanos, Lda., applied the percentage of their commission, arriving at the commission in Argentine gold dollars. Then this commission, so stated in Argentine gold dollars, was converted into United States currency at a rate of exchange between the Argentine gold dollar and the United States gold dollar that is not disputed.

The Fleet Corporation took the position that the rate of commission should first be applied directly to the francs or pounds, the commission, so arrived at, then to be converted into Argentine gold dollars at the rate of exchange actually prevailing at the time when the freight was collectible, being the date of loading or sailing, and not at the rate of 5 and 5.04, which did not reflect the prevailing exchange. When the commission was thus stated in Argentine gold dollars, it was then to be converted into United States currency, the rate of conversion from Argentine to United States gold dollars not being disputed.

The rate used by Dodero Hermanos, Lda., that is to say, 5 francs to the Argentine gold dollar and 5.04 Argentine gold dollars to the pound, was the subject of a communication from Oriental Navigation Company to the Shipping Board May 24, 1921, which, with enclosure, was as follows:

NEW YORK, *May 24th, 1921.*

U. S. SHIPPING BOARD,
45 Broadway, New York City.

Attention: Mr. E. A. Maypother, Chief Auditor.

S. S. *Hwah Jah*, Voyage #1, Foreign Exchange Commission on Freight.

GENTLEMEN: We have your letter of May 23rd, 1921, file My, with reference to commission on freight charged in the disbursement account of this vessel by Agents in the River Plate. In this we may state that the practice of using an official rate of exchange in arriving at commissions due these agents has been the subject of investigation previously by this Company, with the result that we find, according to advices submitted by our Agents, that this procedure is the customary and usual way and in support of their contention they have submitted to us a certificate from the President of the Commercial Exchange at Buenos Aires, the translated copy of which is herein enclosed for your information, and

from which you will note it is required apparently that commission on freight booked be paid in the same currency as that specified or its equivalent at par in Argentine Currency.

Very truly yours,

ORIENTAL NAVIGATION COMPANY,
(Signed) JAMES F. GILL, *Treasurer.*

[Enclosure]

Translation of certificate obtained from the Commercial Exchange

The President of the Commercial Exchange hereby declares that—

Excepting cases in which it has been duly specified to the contrary, or those doubtful cases which must be dealt with separately, it is understood that freights, despatch-money, demurrage, and commission on freight booked in foreign money must be paid in the same coinage as that specified, or its equivalent at par in Argentine Gold, or Argentine Paper at the rate of 0.44 cts. for each Argentine Paper dollar.

Issued at Buenos Aires, on the fifteenth day of the month of June of the year nineteen hundred and twenty.

G. PADILLA, *President.*
(Signed) PABLO M. ALDAGABAL, *Secretary.*

26. On June 10, 1924, there was executed by The Oriental Navigation Company and by the defendant a general release covering the agency agreements mentioned in these findings on defendant's counterclaim. This released The Oriental Navigation Company, its successors and assigns, in the words following:

The United States of America, acting by and through the United States Shipping Board, represented by the United States Shipping Board Emergency Fleet Corporation, doth likewise release and discharge The Oriental Navigation Company, its successors and assigns, of and from any and all claims, demands, differences, and controversies arising out of the aforementioned agreements, operations, and charter thereunder, including any demands and controversies of the steamer *Innoko* aforementioned, but nothing herein contained shall be construed as a release on the part of the United States of America or the United States Shipping Board and/or the United States Shipping Board Emergency Fleet Cor-

poration of a certain claim arising through damage caused to the scow *Mary Ethel* by the steamer *Tenafly*, which is now the subject of litigation between the said agent and T. Donovan, or of certain claims which have arisen in France against the Oriental Navigation Co. of Paris, France, resulting from the operation in 1920 of the Steamship *Sinsinowa*, Steamship *Chester Valley*, and Steamship *Dochet*.

27. If the method asserted by the Fleet Corporation in the ascertainment of the commissions of Dodero Hermanos, Lda., to be correct be so taken, the result would be overpayments thereon by the Fleet Corporation to Oriental of $62,371.14.

On or about August 21, 1924, this amount, in conference between Philip De Ronde, who was president of Oriental and of Philip De Ronde & Co., and Alberto A. Dodero, who represented a French company styled "Sogenavios" of Paris, and who was also a member of the firm of Dodero Hermanos, Lda., was determined upon by them as due Oriental by Dodero Hermanos, Lda., by reason of the fact that the Fleet Corporation's calculation of their commissions was the correct calculation, and that amount had been wrongfully withheld by Dodero Hermanos, Lda., from Oriental. On commissions under the agency agreements otherwise incorrectly computed, it was also determined between them that there was due Oriental additional amounts, which aggregate $7,038.80, a total due Oriental by Dodero Hermanos, Lda., of $69,409.94 under the Fleet Corporation agency agreements. The understanding between Philip De Ronde and Alberto A. Dodero was reduced to a memorandum in writing, addressed to another member of the firm of Dodero Hermanos, Lda., in Buenos Aires, and the net balances in U. S. currency owing back and forth, stated as follows, after making set-offs against the aforesaid sum of $69,409.94, not here in issue:

	U. S. Dollars	
Dodero Hermanos owes Oriental	$53, 322. 79	
Sogenavios owes Oriental	2, 270. 44	
De Ronde & Co. owes Sogenavios		$15, 567. 83
De Ronde & Co. owes Dodero Hermanos		43, 346. 45
Leaving balance due Dodero Hermanos	3, 321. 05	
	58, 914. 28	58, 914. 28

In this statement the Paris and Buenos Aires organizations were treated in the summation as a unit on the debit side, and De Ronde & Co. and Oriental, which were controlled by Philip De Ronde, as a unit on the credit side.

There is no indication that this memorandum or statement of account was ever agreed to by Dodero Hermanos, Lda., or the balance of $3,321.05 ever transmitted to them, or set off against other amounts due from Dodero Hermanos, Lda.

28. There is no satisfactory evidence that a fraud was committed in obtaining the release set out in Finding 26.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The controversy in this case arises out of the requisitioning in 1917 by the United States of the hulls of four steamships under construction by the Great Lakes Engineering Works and the contracts for their completion, whereby the plaintiff claims its predecessor in interest was deprived of the right to operate the steamships when completed on the initial voyage from New York to France and the profits that would have resulted therefrom by reason of which it was greatly damaged. As successor to Oriental Navigation Corporation, the plaintiff has brought this suit to recover the damages alleged to have been so sustained.

Summarizing the pleadings in the case, we find that in its original petition filed April 23, 1930, the plaintiff bases its right to recover on the transactions of a company known as Oriental Navigation Corporation to which it claims to be the successor. Two causes of action are set forth. In the first it is alleged that a company entitled Oriental Navigation Corporation entered into contracts about July 1917 with the Compagnie des Chemins de Fer Algeriens de L'Etat whereby the Oriental Corporation undertook to act as the agent of this railway for the purchase of three steel cargo-carrying ships under construction at the yard of the Great Lakes Engineering Works, Ecorse, Michigan, the three ships being designated as hulls Nos. 168, 172, and 173; that acting as such agent it purchased the hulls and in consideration of the per-

formance of its agreement the right to the possession and use of the vessels upon completion for one voyage from New York to France was granted by the railway company for the sole account and benefit of the Oriental Corporation.

As a second cause of action it was alleged in the original petition that the Oriental Navigation Corporation entered into a similar agreement with the Compagnie des Chemins de Fer de Paris a Lyon et a la Mediterranee in July 1917 whereby it undertook to act as agent for this railway company in purchasing a steamship under construction in the yard of the Great Lakes Engineering Works which was designated as hull No. 169. It was further alleged that as a consideration for the agreement the right to the possession and use of the vessel upon completion for one voyage from New York to France was granted by the railway company; that the Oriental Navigation Corporation carried out its agreement and thereby became vested with the right to the possession of said steamship designated as hull No. 169 upon completion, and the right to use the steamship for one voyage from New York to France for its sole account and benefit.

In both counts it is alleged that about August 3, 1917, while the steamships were in process of construction, the United States, through the United States Shipping Board Emergency Fleet Corporation, requisitioned and took for public use the four steamships referred to in the two counts and the contracts for their construction and completion together with the vested right of the Oriental Navigation Corporation to the possession and use of each vessel for one voyage from New York to France for its own account and benefit.

The petition further alleges that through successive mergers by which all the property of Oriental Navigation Corporation passed first to Oriental Navigation Company, then to The Oriental Navigation Company, and then to the plaintiff, Dawnic Steamship Corporation, the plaintiff became the owner of the claims of Oriental Navigation Corporation against the defendant arising out of the taking and requisitioning of its vested right to operate these steamships for one voyage each to France.

Opinion of the Court

In both counts it is alleged that about November 5, 1917, Oriental Navigation Corporation filed with the United States Shipping Board a claim asking just compensation for its rights and property requisitioned and taken by the United States as recited above, and further stated that about April 6, 1918, the Oriental Navigation Corporation at the request of the United States Shipping Board Emergency Fleet Corporation agreed to hold its claims for just compensation in abeyance until a settlement had been effected between the Shipping Board and railways named for the rights and interests of the respective railway companies in the property thus requisitioned by the United States. About September 22, 1926, the Shipping Board entered into an agreement with the respective railway companies whereby their claims arising out of the requisitioning of the steamships were finally settled and adjusted.

It is further alleged that The Oriental Navigation Company, successor to Oriental Navigation Company, about August 1, 1929, filed a petition with the United States Shipping Board requesting it to resume consideration of the claims in controversy; that the committee on claims granted a hearing on November 15, 1929, and the same day filed a report with the Shipping Board recommending that the Board decline to resume consideration of the claims; and that about January 15, 1930, the Shipping Board approved the recommendation of the committee and denied the claims.

November 22, 1930, plaintiff filed an amended petition more in detail than the first petition but making the same allegations, stating that Oriental Navigation Corporation agreed to act as the agent of the two French railway companies above mentioned in purchasing the four hulls named and that in consideration of the performance of its obligations under the agreement the railways each respectively granted to Oriental Navigation Corporation the right to the possession and use of the vessels so acquired for one voyage from New York to France.

February 6, 1932, plaintiff filed a second amended petition in four counts. The first count alleged in substance that in 1917 Oriental Navigation Corporation purchased the

hull and contract for the construction of a steamship designated as No. 172; that shortly after the same company agreed to sell the steamship to a French railway company and to deliver the vessel when completed to the purchaser in France. Each of the other three counts made similar allegations with reference to steamships designated as hulls Nos. 173, 168, and 169, respectively; and that arrangements had been made for the use of each vessel on the voyage from New York to France for its own account and benefit.

The allegations of each count with reference to the requisition made by the defendant of these steamships were substantially the same as stated in the original petition and first amendment thereto and it was further alleged that the Oriental Navigation Corporation and the plaintiff, as its successor, were deprived of the title, possession, and use of said steamships and of the right to use them for a voyage to France, for which the plaintiff claimed just compensation.

The defendant in its answer says that the plaintiff's action is barred by the statute of limitations and in argument contends that the evidence fails to support the allegations of the second amended petition but to the contrary shows that Oriental Navigation Corporation was not the owner of the ships at the time they were requisitioned by the defendant and under the final contract it had no possessory rights in them. Other defenses are set up in argument which we do not find necessary to consider.

We do not think it is necessary to set out all the ramifications of the various contracts and ownership interest which were connected with the construction of the steamships involved. There is an important matter of fact as to which the parties are in dispute and that is as to whether the plaintiff's predecessor, Oriental Navigation Corporation, purchased the ships for itself and thereafter delivered them to the French railway companies; or whether, acting as agent, it purchased the ships for the railway companies under an agreement that it should receive as its compensation the right to operate the ships on their initial voyage to France and receive the profits therefrom.

The findings of the commissioner of this court who heard the evidence and received the testimony offered are in accord-

ance with the latter statement set out above; that is, the effect of his findings is that Oriental Navigation Corporation purchased the hulls for the French railway companies, acting as their agent, under an agreement that it should receive compensation for so acting as stated above. Counsel for plaintiff strenuously contend that the findings of the commissioner are not supported by the evidence. We have examined the testimony with care and think the commissioner was amply justified in his conclusion. It would serve no useful purpose to recite the details of the evidence bearing on this question but we might call attention to the fact that the final contract in writing for the completion and delivery of the steamship in each case recognized one of the French railways as purchaser and Oriental Navigation Corporation as agent in the transaction. (See Finding 1.) Counsel for plaintiff argue that there is nothing to show that Oriental Navigation Corporation was authorized to act as agent and that in fact it did not so act but purchased the steamships for itself. Exhibits "L" and "M" which are attached to plaintiff's second amended petition and offered in evidence show incontestably that the Oriental Navigation Company was authorized to and did act as agent in the purchase of hull No. 168 for the French railway with which it had direct transactions. Counsel for plaintiff call attention to some informal letters which might seem to indicate that the railway companies as to the other hulls were not the purchasers, but the final contract with the builders made after these communications were exchanged was the same in all cases; that is, that the Oriental Company was to act as agent in purchasing the ships and the railway companies were the purchasers. Moreover, if the Oriental Navigation Company was the purchaser and the railway companies did not become owners until the ships were delivered in France, there was no occasion to put in the contracts the provisions that the Oriental Company was to pay the expenses of the voyage from New York to France. There is no direct evidence of the authorization as to the other hulls, but taking the transaction as a whole and considering the acts of all the parties connected therewith, we think it is made plain that the railway companies were the purchasers and Oriental Navigation Cor-

poration acted as an agent in negotiating the purchase. This is in substance and effect the allegation contained in the original petition and in the first amended petition, as we have shown above. It should be specially noted that both of these petitions were sworn to by the president of The Oriental Navigation Corporation who was an officer of Oriental Navigation Company and also president of the plaintiff corporation. He certainly was in a position to know the facts with reference to the capacity in which his corporation had been acting in the transaction. The claims filed by Oriental Navigation Corporation with the Fleet Corporation were presented as in account with itself and as agents for the respective French railways. Two accounts were presented for each ship, one being an account of payments and expenses presumably by the railways, the other styled "proforma voyage account" and estimated the profit of a voyage, presumably the claim of Oriental Corporation. These were the only claims presented to the Fleet Corporation so far as the evidence shows. (See Finding 5.) In these accounts nothing was stated with reference to the ownership of the hulls. Apparently the effort was to combine the two claims without stating definitely the basis for recovery. A question arises here as to whether the cause of action stated in the second amended petition was ever presented to the Fleet Corporation, but we do not find it necessary to determine it.

It is now contended by counsel for plaintiff that the contracts for the purchase of the hulls made by Oriental Navigation Corporation as agents for the French railways (see Finding 1) were made only to present the appearance of a purchase by an alien, it being supposed that our Government would not requisition property of an alien even though it was located in the United States and controlled by our laws. It is difficult to understand how such an idea could have arisen but in any event the circumstances are such that the French railway companies must have known what Oriental Corporation was doing and the claims presented to the Emergency Fleet Corporation by the Oriental Corporation for itself and the railways recognized and affirmed the agency.

It is not necessary, however, that we should base the judgment rendered herein upon our finding with reference to the

agency as we think we should first consider whether plaintiff's action is barred by the statute of limitations. For the same reason we do not discuss some disputed questions of fact with reference to payments and other matters which are immaterial if the statute of limitations applies.

Plaintiff claims to have commenced its action under provisions found in the Act of June 15, 1917, c. 29, 40 Stat. 182, 183, as modified by the Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988, 989. But this, in our opinion, does not prevent the application of the general statute of limitations applicable to all cases commenced in this court.

This court has held that under the statutes referred to above the claimant whose property had been requisitioned must first present his claim to the Emergency Fleet Corporation for a ruling thereon, and the question arises as to what extent the procedure required would toll the statute of limitations.

The evidence shows that on May 8, 1923, while the Fleet Corporation was proceeding to consider the claims filed by Oriental Navigation Corporation, Oriental Navigation Company stated in writing to the Emergency Fleet Corporation that its claims for recovery of loss sustained by it arising out of the requisitioning by the United States of the four hulls, Nos. 168, 169, 172, and 173, were withdrawn without prejudice to any right which Oriental Navigation Company "may have", and the Emergency Fleet Corporation accordingly eliminated these claims from its docket. (See Finding 9.)

July 2, 1923, the Oriental Navigation Company by an instrument in writing sold to The Oriental Navigation Company all its property of every character and description. (See Finding 10.) August 26, 1929, The Oriental Navigation Company petitioned the Shipping Board to resume consideration of the claims filed by Oriental Navigation Corporation. The claims were referred to a committee on claims of the United States Shipping Board which recommended that the board decline to resume consideration of the claim for the reason that more than six years had elapsed since it was withdrawn and more than twelve years since the claim originated. On January 15, 1930, the Shipping Board

adopted a resolution declining to resume consideration of the claim. (See Finding 15.)

The plaintiff contends that the statute of limitations did not commence to run until the Shipping Board had declined to resume consideration of its claims and in support of this contention cites the case of *Smith* v. *United States*, 67 C. Cls. 182. But the reasons for the court's decision in that case do not exist in the case before us. In the case at bar there was nothing to prevent the plaintiff's predecessor from pressing its claim to a conclusion before the Shipping Board in the first instance. On the contrary, the Shipping Board was proceeding with its consideration at the time it withdrew its claim. In the *Smith case*, *supra*, the court said in its opinion that—

> * * * it was the Government's act which delayed the presentation of a suit; it was the consumption of time by the Government to consider the merits of the claim, and determine what to do, that suspended action * * *. We are of the opinion that where the delay in action is to be attributable wholly to the act of the Government, in the consideration of the claim, the plaintiff may invoke the jurisdiction of the court within the statutory period, following the final judgment of the Shipping Board.

In the instant case there was no delay attributable to the Fleet Corporation or the Shipping Board. The delay was wholly the result of plaintiff's withdrawal of its claim and failing to resume prosecution of it until more than six years thereafter. The requirement that the claim must first be presented to the Shipping Board for consideration and determination did not authorize plaintiff to postpone the presentation of the claim to such a time as it should see fit to proceed. It is said in 37 C. J., sec. 324, pp. 953, 954, that—

> Where plaintiff's right of action depends upon some act to be performed by him preliminary to commencing suit, and he is under no restraint or disability in the performance of such act, he cannot suspend indefinitely the running of the statute of limitations by delaying the performance of the preliminary act; for it is not the policy of the law to put it within the power of a party to toll the statute of limitations; if the time for such performance is not definitely fixed, a reasonable time, but that only, will be allowed therefor.

The statute of limitations is established to prevent the prosecution of stale claims when the opposing party may not be able to properly contest them on account of lapse of time. If a party who is required to do some preliminary act before commencing suit were permitted to take his own time to complete the act, the effect would be to exempt him from the statute of limitations. Such a rule, in our opinion, should not be, and is not the law. The courts universally hold that the general principles upon which the statute of limitations is founded must be preserved, but circumstances may modify its application. As stated above, where a preliminary step is required before suit is begun, a reasonable time will be granted therefor but only a reasonable time. For over six years after withdrawing the claim it had filed with the Fleet Corporation no action was taken by the plaintiff or its predecessor, and more than twelve years had elapsed since the claim originated. There is nothing to indicate that the Fleet Corporation, at the time of withdrawal of the claim, would not proceed with its consideration and determination if requested, and in any event it was the duty of the plaintiff to present and proceed with its claim with reasonable diligence. It could not extend the time by withdrawing its claim. As shown above, only a reasonable time will be allowed the claimant for the completion of acts which are a necessary preliminary to bringing suit. When the plaintiff and its predecessor failed to take any action for more than six years after the claim had been withdrawn and more than twelve years after it had originated, it was negligent, did not act within a reasonable time, and is not entitled to have the statute of limitations extended for its benefit. In fact, the plaintiff delayed so long that we think it might well be said that it has been guilty of laches in presenting its claim and its action defeated on that ground. It is, however, sufficient to say that the statute of limitations applies.

It is also argued on behalf of plaintiff that the second amended petition does not present a new action and merely pleads in a different form the same case as was presented in the original and first amended petitions. It is true that the measure of recovery is the same but this does not determine the nature of the action.

We have seen that the ship hulls together with the contracts for their completion were requisitioned in 1917. The second amended petition was filed February 6, 1932, nearly fifteen years later. We think it is clear that the second amended petition upon which suit is now brought presents an altogether different basis for recovery in that it alleges that the plaintiff's predecessor had purchased these hulls and the contracts for their completion and in effect was owner thereof at the time they were requisitioned; while the original petition and the first amended petition made no such claim of purchase and ownership but alleged as a basis for the action that the ships were purchased for the French railways by plaintiff's predecessor acting as agent for them under a contract that it was to receive as compensation for its services the right to operate the steamships on their first voyage to France. The difference between the two causes of action will appear plainly when we consider the apparent reason for the change in pleading. Under the allegations of the original petition and the first amended petition, the defendant requisitioned the respective hulls and the contracts for their completion, and under the rule laid down in the case of *Omnia Co.* v. *United States*, 261 U. S. 502, the defense would be set up that the contract the plaintiff's predecessor had giving the right to use and operate the ships on the first voyage to France was not requisitioned but merely frustrated, and that consequently plaintiff had no valid cause of action against the defendant. No such defense could be made to the second amended petition which alleged that the plaintiff's predecessor had purchased the steamship hulls and the contracts for their completion prior to the time they were requisitioned and in effect that plaintiff's predecessor was then the owner thereof. These allegations, if true, presented a basis for a valid cause of action.

It is a familiar doctrine that when a new and different cause of action is set up by an amended petition filed after the statute of limitations has run, the statute applies in the same manner as if no prior petition had been filed.

We conclude that the cause of action stated in the second amended petition is barred by the statute of limitations and

this makes it unnecessary to consider the other defenses set up by defendant.

The plaintiff's petition must be dismissed and it is so ordered.

DEFENDANT'S COUNTERCLAIM

June 10, 1924, there was executed by The Oriental Navigation Company and by the defendant a general release covering the matters set up as a basis of defendant's counterclaim. (See Finding 26.) The defendant now contends that this agreement was obtained by fraud and is invalid. The fraud is claimed to have been shown by a communication from the Oriental Navigation Company to the Shipping Board dated May 24, 1921. (See Finding 25.) But the only statement of fact contained in this communication is in effect that the Oriental Company had been advised by its agents that the practice of using an official rate of exchange in computing commissions which had been followed was the customary and usual way; and that their agents, in support of this statement, submitted to them a certificate obtained from the Commercial Exchange of Buenos Aires. There is nothing to show that the Oriental Company had not been so advised. Moreover, we think the defendant which was carrying on a shipping trade with South America had every opportunity to know what the real fact was with reference to this matter of exchange in computing commissions. As against this, it is urged that the evidence shows that the president of Oriental Company and a member of the firm to which the commission was due had agreed upon computing the commissions on a different basis which would show that a certain amount was due the defendant. There is nothing, however, to show that this agreement was ever ratified by the firm of Dodero Hermanos, who would have been liable under it. We conclude that the fraud is not shown by satisfactory evidence and the counterclaim is not sustained. It is therefore ordered to be dismissed.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

Syllabus

S. M. SIESEL COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 43164. Decided March 4, 1940]

On the Proofs

Government contract; unauthorized ruling by the Comptroller General; changed conditions.—Plaintiff entered into a contract with the Government to "furnish all labor and materials, and to perform all work required for construction of foundations, etc.," for the Department of Justice Building, Washington. Drawings and specifications showed the average length of the piles would be 27 feet 6 inches, and on this estimated length of piling plaintiff made its bid. Tests made in accordance with the provisions of the contract revealed that the estimated length of 27 feet 6 inches was grossly in error; and only 55.5% of the estimated total footage was driven and of the estimated number of piles (10,538) 1,506 were omitted. Plaintiff offered a credit representing the estimated saving by reason of this difference. The matter was referred to the Comptroller General with a recommendation for equitable adjustment and with a finding of fact by the contracting officer in which the contracting officer held the conditions were radically different from those on which the plans were drawn and the specifications made and on which the plaintiff had based its bid. The Comptroller General ruled that section 193 of the specifications governed. In the settlement the Government deducted from the contract price the sum of $161,266.25, in accordance with the ruling of the Comptroller General.

Held:

1. The contractor was entitled to have the contracting officer construe the contract and arrive at a determination of the facts as found by him after unforeseen conditions had been brought to his attention by the contractor.

2. There was no provision in the contract allowing the Comptroller General the right to construe the rights of the parties under the contract, either in fact or law.

3. Under the finding of the contracting officer as to the difference in conditions, article 3 of the contract applies to the settlement and not the provisions of the specifications under sections 192 and 193.

4. Under the erroneous and unauthorized construction of the contract by the Comptroller General, there was deducted as a credit to the Government the sum of $161,266.25, whereas if the plaintiff had been accorded an equitable adjustment there would have been a deduction of only $93,089.27, or a difference of $68,176.98.

The Reporter's statement of the case:

Mr. Dean Hill Stanley for the plaintiff. *Mr. Joseph R. McCuen* and *Tilson, Stanley and McCuen* were on the briefs.

Mr. J. Robert Anderson, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a general contractor, incorporated under the laws of the State of Wisconsin.

2. On the 19th day of September 1931, plaintiff and defendant entered into a contract whereby, for the sum of $949,000, the plaintiff, called the contractor, agreed to "furnish all labor and materials, and perform all work required for construction of foundations, etc., for the U. S. Department of Justice Building, Washington, D. C.," in accordance with specifications, schedules, and drawings made a part thereof.

A copy of the contract and specifications is filed in the case, as plaintiff's Exhibits Nos. 1 and 2, respectively, and made part hereof by reference.

Plaintiff started work on its contract October 13, 1931.

3. In making estimates for its bid price, plaintiff had before it a copy of the specifications and the drawings later made part of the contract.

Section 114 of the specifications provided:

> Borings have been made at various points on the site to ascertain the variations in material strata and the depths at which they are encountered. These results are indicated on the drawings.

The drawings indicated the borings referred to and estimates made therefrom both by plaintiff for its bid and by the defendant in its specifications showed that the average length of piles in place would be 27 feet 6 inches. On this estimated length of piling plaintiff made its bid.

4. Furnishing all labor, materials, and equipment necessary to furnish and drive concrete piles in the foundations for the building was part of plaintiff's contract.

Plaintiff was, under the contract, permitted to use, and did use, precast concrete reinforced piles, precasting the piles

with its own labor. All piles had to be driven to a "safe carrying capacity" of not less than 40 tons.

Section 182 of the specifications provided:

> *Test Piles.*—If precast piles are used, the Contractor shall drive fifteen test piles to predetermine, as far as possible, the length of the piles required to secure the specified bearing in the various areas of the work, and these tests shall be made sufficiently in advance so that pile driving can operate continuously. The object of this clause is to prevent delay in the progress of the work and to be assured that the Contractor will at all times have on hand piles of sufficient length to meet any condition that may arise.

Sections 192 and 193 of the specifications were as follows:

> 192. It is estimated that the average length of the piles will be twenty-seven feet six inches (27′6″) in place, measured from the tip to the cut-off lines indicated on the drawings. Should the aggregate length of the total number of piles driven, where so measured, be greater or less than aggregate length estimated, adjustment will be made in the contract price on the following basis:
>
> 193. $1.85 per linear foot additional to the contract price for the number of feet in excess of the aggregate linear feet estimated, or $1.25 per linear foot deduction from the contract price for the number of feet less than the aggregate linear feet estimated. The cost or credit for any increase to or decrease from the total number of piles shown on the drawings shall be at these unit prices per linear foot.

The aggregate linear feet estimated was 289,795, being 10,538 piles at 27 feet 6 inches each.

It was the understanding of both parties that the length of 27 feet 6 inches was a reasonably accurate estimate, and that the increase or decrease in contract price, provided for in Sections 192 and 193, of $1.85 and $1.25 per linear foot, applied only to a situation that might ordinarily be expected in work of the nature here involved.

Articles 3 and 4 of the contract read as follows:

> ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease

in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

5. The plaintiff drove test piles as provided by Section 182 of the specifications, beginning that work November 9, 1931. In all, plaintiff drove 125 test piles. These tests were continued until the third week in January of 1932. They revealed that the estimated average length of 27 feet 6 inches was grossly in error. Shortly after the driving of the test piles commenced plaintiff disclosed this situation to the defendant's construction engineer, detailed by the Supervising Architect of the Treasury Department, under the specifications, to supervise the work, and who in fact did supervise the work. The construction engineer suggested continuance of the test-pile driving to see what might develop, and the

work was continued. At the same time plaintiff was proceeding with its principal contract work.

6. In November of 1931, and while the test piles were being driven on the site of the work, plaintiff discovered that it was not possible to get any penetration for piles below the bottom of the foundations under the boiler room. The excavation for the boiler-room section was lower than any other part of the site. Plaintiff thereupon, at defendant's request, made a proposition thereto to eliminate the piling under the boiler-room section, that had been called for by the plans, and put the foundation directly on the gravel strata found there, which had prevented penetration.

November 30, 1931, plaintiff, in writing, offered a credit to the defendant for the omission of this piling, stating:

> As all concrete piles in the boiler-room section, which is bounded by Pennsylvania Avenue, Column #586, #571, and #650, totaling 1,023 piles or 28,132½ linear feet, are omitted from this area, we will allow a credit of $28,132.50. Inasmuch as this is a major change calling for the *omission* of about 10% of the piles in the job, we have allowed a unit price of $1.00 per foot which we consider fair, considering that our equipment and overhead is spread over a lesser production.

This calculation of the credit was rejected by the Supervising Architect December 21, 1931, on the ground that the contract rate was $1.25. There followed other correspondence, and it was agreed by plaintiff and by the contracting officer that proposal for a deduction from the contract price for omission of the boiler-room piling should be postponed to the completion of the pile log of the job, and this agreement was thereafter extended to other omissions of piling and to decrease in length from the estimated average of 27 feet 6 inches, until the job should be completed and the proper data assembled.

7. There were pits where elevators and sumps were located, and in some other places. The plans provided for piles under all these pits. The bottoms of the pits were comparatively low and the piles would be correspondingly short, in some cases only two feet in length. It was accordingly determined by the contracting officer to omit piling in the pits and substitute therefor lowered footings. Plain-

tiff's quotations for lowering the footings were accepted, the contracting officer stating in his letters of acceptance that the quoted prices did not include credit to the Government for the piles omitted and this matter would form the subject of a later adjustment.

8. In the course of the work the average length of piles actually driven turned out to be less than the original estimated average length of 27 feet 6 inches. Only one pile reached the length of 27 feet 6 inches.

There were actually driven 9,032 remunerable piles, at an average length of 17.80137 feet, a total length of 160,782 linear feet. The number of piles omitted was 1,506, being that number less than the original estimate agreed upon by the parties to the contract.

9. May 9, 1932, the plaintiff presented to the Supervising Architect a proposed credit to the defendant of $91,407.22, set out in detail, as follows:

> We hereby submit for your approval a credit in amount of $91,407.22 to be deducted from our contract price covering the foundations for the Department of Justice Building, Washington, D. C.
>
> This credit arises from two causes (a) the length of piles actually driven was considerably shorter than the estimate length of piling specified and (b) the number of piles actually driven was considerably less than the number shown on contract drawings.
>
> We quote page 21 of the specifications covering this project, as follows:
>
> "*Par. 192.* It is estimated that the average length of piles will be twenty-seven feet, six inches (27′6″) in place, measured from the tip to the cut-off lines indicated on the drawings. Should the aggregate length of the total number of piles driven, where so measured, be greater or less than aggregate length estimated, adjustment will be made in the contract price on the following basis:
>
> "*Par. 193.* $1.85 per linear foot additional to the contract price for the number of feet in excess of the aggregate linear feet estimated, or $1.25 per linear-foot deduction from the contract price for the number of feet less than the aggregate linear feet estimated. The cost or credit for any increase to or decrease from the total number of piles shown on the drawings shall be at these unit prices per linear foot."

We submit for your consideration the following data:

	Lin. ft.
1. Total number of concrete piles required by contract drawings 10538. At a specified estimated length of 27'6"	289, 795
2. Total number of piles actually driven, including 40 extra piles, 8,997. At an average length of 17.9 feet per pile	160, 782
3. Total linear-foot piling specified but not driven	129, 013
4. Number of piles actually omitted, 1,581, or 15% of the total shown on contract drawings.	
5. Actual total footage driven is 55.4% of the specified estimated total footage required.	

It is evident from the foregoing data that the actual conditions encountered on the work were radically different from that contemplated by the drawings and specifications.

Contract Drawing No. 400 clearly indicates that the estimated length of 27'6" specified in the specifications was arrived at by figuring the penetration of the piles thru soil classified as easy-drilling, and figuring that they would bring up somewhere between elevation −25 and −35. This information is all that the bidder has to base his calculations upon.

With the exception of one single pile, in no case did the piling as driven reach the specified estimated length of 27'6"; there were no compensating cases where some piling would be shorter than the specified length and others longer than the specified length. The piles were all uniformly shorter than the specified length.

The combination of the two circumstances, namely, that all piles driven were shorter than the specified length and that 15% of the number of piles shown on the contract drawings could not be driven at all due to the actual soil conditions, represents a major change in the contract not contemplated by the Treasury Department or the bidding contractors.

We, therefore, feel that the basis for gauging the credit due the Department under these circumstances should not follow the rule as laid down in Par. 193, but should take into account the effect of the actual performance upon the fixed costs which were incurred by our company, and which were required whether the actual footage driven would have been less than, equal to, or greater than the footage set up as estimated under the contract documents.

These fixed costs, such as items of plant rental, installation, dismantling, laying out the work, testing for length, and job overhead, were the same total sum for the quan-

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tity driven as it would have been for the specified estimated quantity, and are as follows:

(a) Cost of plant rental, installation, dismantling, laying out of piles, testing for length, and job overhead	$46, 800. 00
(b) Pile yard rental, overhead, construction of yard and buildings	23, 350. 00
	$70, 150. 00

These fixed charges amount to 43.5¢ per foot of pile actually driven. Had the contract quantity been driven, they would have amounted to 24.2¢ per foot, which is the difference between a profit and no profit.

Your more recent specifications covering unit price credits and extras in connection with changes specify that the percentage of footage to which units apply approximates 3% of the total estimated footage specified. In more recent cases you have specified a deduction for omitting piles similar to those in the Justice Job at 75¢ per foot, which unit represents the actual cost of material. There is no appreciable difference in the labor used for driving a pile 20 ft. long or one 30 ft. long. This clearly indicates that such adjustments are intended for minor, and not major, changes. This change in the practice of the Department would indicate that more recent experience has suggested a more equitable method of adjustment.

In this instance, we believe that an average of 5% either way in the total amount of footage actually driven as compared with the amount set up in the contract documents would be a reasonable fluctuation, and that an allowance of the actual cost of labor and material entering into the making, hauling, unloading, and placing of the pile would, in this case, be a fair allowance for the footage omitted over and above the 5% of the estimated quantity, and, therefore, we suggest the following:

1. Total footage omitted	129, 013	
Less 5% of the total footage estimated	14, 490	
Balance	114, 523	
2. Credits involved:		
14,490 lin. ft., at 1.25 per ft		$18, 112. 50
114,523 lin. ft. at .64 (Actual cost of material and labor used in manufacturing, hauling, and placing piles)		73, 294. 72
Net Credit		$91, 407. 22

Will you kindly give this matter your earliest consideration and forward us your credit order for the same?

10. The contracting officer treated plaintiff's proposal of May 9, 1932, as a claim and transmitted it to the Comptroller General, June 4, 1932, for his action, with the following statement of facts and recommendation:

> Your attention is invited to the contract, No. TI SA 2206 of September 19, 1931, with the S. M. Siesel Co., of Pittsburgh, Pennsylvania, for the foundations, etc., for the Department of Justice building, this city.
>
> Section 6 of the specification for this work sets forth the requirement for concrete piling, and paragraph 193 provides rates for additional feet in excess of the number of feet estimated, or deduction of the number of feet less than that estimated.
>
> Under date of May 10, 1932, the Construction Engineer submitted a letter from the contractors requesting a credit of $91,407.22 on the contract, for the reason that the length of piles actually driven were considerably shorter than the estimated length of the piling specified, and that the number of piles actually driven were considerably less than the number shown on the contract drawings. The contractors in submitting the claim refer to paragraphs 192 and 193 of the specification, and submit certain data in support of said claim.
>
> The Construction Engineer in transmitting the claim refers to the conditions revealed at the site, and states that they could not have been foreseen and were disclosed only by the actual driving of piles and the special corroborative borings. He states further that the figures used by the contractors in their communication are taken from the official records, and expresses the hope that the proposal for the deduction may be given sympathetic consideration.
>
> The contractors' proposal was submitted to the Board of Award of the Office of the Supervising Architect for its consideration and action, and it directed that the matter be submitted to your office as a claim.
>
> The claim constitutes a request for adjustment of the piling driven on a more equitable basis than the contract and specification stipulation would give them, and is based on the fact that 15% of the total number of piles estimated in the specification were not driven on account of the conditions encountered at the site and that the total estimated average length of piles was specified as 27′6″, while, as an actual fact, with but one exception, no pile of this length was driven, the average

length being 17.9′. The actual number of piles omitted was 1,581, against the estimated number of 10,538, which resulted in the total footage driven being but 55.4% of the estimated amount.

In this connection, it is pertinent to point out that paragraphs 192 and 193 of the specification (quoted in letter of the contractors of May 9) are intended to cover deviations of pile-footage within reasonable limits and not such extreme deviations as actually occurred and which could not have been anticipated by bidders.

In view of the fact that it will undoubtedly be some time before settlement of the contract can be made, the work being only 77% complete on the first of May, the claim is submitted for your action at this time, with the recommendation that it be given favorable consideration.

The letter from the Construction Engineer transmitting the proposal of the contractors, together with a copy of the action of the Board of Award upon which was based the direction for submission of the matter to your office, are inclosed herewith.

11. Plaintiff completed its contract work July 2, 1932.

12. The Comptroller General in reply September 26, 1933, advised the Secretary of the Treasury that adjustment of the contract price should be solely on the basis of Sections 192 and 193 of the specifications, and the Comptroller General's decision was transmitted to the plaintiff by defendant's construction engineer November 17, 1933.

December 1, 1933, the plantiff asked for a reconsideration of the Comptroller General's decision, and May 4, 1934, the Comptroller General formally expressed adherence to his decision.

June 8, 1934, the plaintiff again asked for reconsideration, the Comptroller General again considered the matter, and the contracting officer June 27, 1934, made the following findings, which were forwarded to the Comptroller General August 17, 1934:

A controversy having arisen in connection with the concrete piling foundation work at the Department of Justice Building, it has become necessary for this Division to determine the actual facts in the matter.

Prior to the advertisement of this project, certain test borings were made by this Division, which indicated that

it would be necessary to drive piles to an average depth of 27′6″. The results of these test borings were set forth on Drawing S–12 which was specifically excluded as a contract drawing by paragraph 2–A of the specifications, as follows:

"2–A. Drawings Nos. X–1, X1–A, and S–12, relating to conditions of the site, are not to become contract drawings. They are furnished to bidders only for such use as they maye choose to make of them. The accuracy of data given on these drawings is not guaranteed."

Drawing No. 400, however, was made a contract drawing and included the test boring information contained in drawing S–12. Paragraph 192 and 193 of the specifications made the following provisions for an adjustment of the contract price upon the determination of the actual length of the piles required:

"192. It is estimated that the average length of the piles will be twenty-seven feet six inches (27′6″) in place, measured from the tip to the cut-off lines indicated on the drawings. Should the aggregate length of the total number of piles driven, where so measured, be greater or less than aggregate length estimated, adjustment will be made in the contract price on the following basis:

"193. $1.85 per linear foot additional to the contract price for the number of feet in excess of the aggregate linear feet estimated, or $1.25 per linear foot deduction from the contract price for the number of feet less than the aggregate linear feet estimated. The cost or credit for any increase to or decrease from the total number of piles shown on the drawings shall be at these unit prices per linear foot."

The estimated number of piles to be driven was 10,538, or a total estimated linear footage of 289,795 feet on the basis of an average length of 27′6″ per pile.

The final record discloses that only 8,997 piles were driven, and that the average length of these piles was 17.9′ instead of 27′6″ as estimated, or a total of 160,782 linear feet actually driven.

It is noted that 1,581 piles were omitted or 15% of the total number shown on the contract drawings, and that only 55.4% of the estimated total footage was actually driven.

It is further noted that due to the changed conditions, the contractor found it necessary to prepare and submit new foundation drawings, which were subsequently approved by this Division.

If paragraph 193 is to be used as the basis of an adjustment of the contract price, then the Government is entitled to a deduction in the sum of $161,266.25 from the contract price for the 129,013′ of estimated piling not furnished. The contractor contends that such an adjustment would be wholly inequitable and unjust, pointing out that the normal maximum variation between estimated piling and actual piling length is about 5%.

The contractor insists that the subsurface conditions encountered were so obviously different from those anticipated by either party to the contract, that a situation has arisen to be governed solely by the provisions of Articles 3 and 4 of the contract. It is undoubtedly true as the contractor points out that it was never anticipated that the actual average length of piles would vary 10′ from the estimated length. In similar cases, viz, the Department of Labor Building, the Interstate Commerce Commission Building, the Internal Revenue Building, the Department of Commerce Building, and the Archives Building, provisions are found for unit price deductions, but these deductions are specifically confined to a range of 3% variation.

The contractor suggests that the deduction of $1.25 per linear foot omitted should be confined within the range of a 5% variation from the estimated footage, and beyond this range an equitable adjustment of the contract price should be had under the terms of Articles 3 and 4 of the contract.

The contractor states that the actual saving in cost occasioned by the decreased footage was 64¢ per linear foot and using this as a basis of deduction for footage outside the 5% range, the contractor offers a total deduction of $91,407.22.

This figure is arrived at in the following manner:

	Lin. ft.
1. Total footage omitted	129,013
Less 5% of the total footage estimated	14,490
Balance	114,523
2. Deductions involved:	
14,490 lin. ft. at $1.25 per ft	$18,112.50
114,523 lin. ft. at $0.64 per ft	$73,294.72
Net amount of deduction	$91,407.22

The above statement of the contractor that only 64¢ per linear foot was saved for the omitted footage has not been verified by this Division.

13. July 18, 1934, the contracting officer signed and transmitted to plaintiff the following communication:

> Reference is made to your contract for construction of the foundations of the Department of Justice Building, this city, and to the question of underrun of pile driving. In accordance with the estimated number of 10,538 piles to be driven, an average estimated length of 27′6″, and the unit rate of $1.25 per foot for each foot of piling omitted, as called for by the specification, you were to submit your deduction proposal.
>
> The unusual conditions encountered made it unnecessary for you to drive the entire estimated number of 10,538, to an average estimated length of 27′6″, or a total of 289,795 feet, and you actually drove only 9,032 piles, an average length of 17.80137′, or a total of 160,782 feet. Due to these unforeseen conditions which resulted in such a huge underrun, you requested that consideration be given to a deduction proposal in lesser amount than the unit rate of $1.25. This matter was presented to the Comptroller General of the United States, and in decision of September 26, 1933, which was reaffirmed May 4, 1934, to you, he holds that adjustment for the underrun on any other basis than that of $1.25 per foot set forth in the specification cannot be authorized.
>
> Therefore, in accordance with the said decision of September 26, 1933, the said credit for the total underrun at the specified rate of $1.25 per linear foot is hereby established in the sum of one hundred sixty-one thousand two hundred sixty-six dollars and twenty-five cents ($161,266.25), which will be retained from any moneys due you.

14. The last payment on the contract was made to the plaintiff August 24, 1934, under protest by the plaintiff as to the basis thereof.

In the statement of account upon which this payment was made, the contract price, as amended by changes other than those relating to omission of piles or their decrease in footage, was calculated by defendant's officers as $1,000,521.02. From this was deducted $161,266.25 for "piles not driven," leaving $839,254.77 as the final contract price.

The sum of $161,266.25 is arrived at by applying a rate of $1.25 to 129,013 linear feet, being 160,782 feet less than the estimate of 289,795 linear feet of 10,538 piles at 27 feet 6 inches per pile.

The number of piles omitted, 1,506, at 27 feet 6 inches per pile, being 41,415 linear feet, at a rate of $1.25, results in $51,768.75.

The balance of 87,598 linear feet represents the footage of 9,032 piles under 27 feet 6 inches per pile, 9.69863 feet per pile, which at $1.25 per foot amounts to $109,497.50.

The average shortage per pile driven was 9.69863 feet, being approximately 35% of the estimated average of 27 feet 6 inches.

The number of piles omitted, 1,506, is about 14% of the number planned to be driven, 10,538.

The combined footage omitted and found short, 129,013, is about 44.5% of the original estimated footage of 289,795. That is to say, only 55.5% of the estimated footage was actually driven.

15. The total cost to plaintiff of driving 9,032 piles of 160,782 linear feet was $255,196.03. A fair estimate of the cost to plaintiff of driving 10,538 piles of 289,795 linear feet is $348,285.30, a difference of $93,089.27, which is the cost saved to plaintiff by reason of having to drive only 160,782 linear feet of piling instead of the estimated footage of 289,795.

16. The subsurface conditions discovered and encountered at the site during the progress of the work differed materially from those shown on the drawings and indicated in the specifications, in respect to penetration of the foundation piling, as heretofore described and set forth in these findings.

The consequent omission and shortening of the piles were regularly ordered by the contracting officer, and he made no adjustment of the contract price therefor.

17. The deduction of $93,089.27 from plaintiff's contract price, as a credit for footage of piling not driven, represents an equitable adjustment of the amount of deduction provided for in Section 193 of the specifications for normal variation from the estimated footage.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This action involves the construction of a contract entered into between the plaintiff and the defendant on the 19th day

of September 1931, whereby the plaintiff agreed to "furnish all labor and materials, and perform all work required for construction of foundations, etc., for the U. S. Department of Justice Building, Washington, D. C.," in the sum of $949,000 in accordance with the specifications, schedules and drawings attached to the contract.

When the plaintiff made its estimate on which its bid was based it had before it a copy of the specifications and drawings. Section 114 of the specifications provided:

> Borings have been made at various points on the site to ascertain the variations in material strata and the depths at which they are encountered. These results are indicated on the drawings.

The drawings on which plaintiff based its estimate and the specifications furnished by the defendant showed the average length of the piles would be 27 feet 6 inches. It was on this estimated length of piling that plaintiff made its bid.

Section 182 of the specifications provided that, where precast piles are used, the contractor should provide 15 test piles to predetermine the length of the piles required to secure the specified bearing in the various areas of the work.

The plaintiff, in carrying out this provision of the specifications, drove 125 test piles and, as a result of these tests, it was revealed that the estimated length of 27 feet 6 inches was grossly in error and this was immediately brought to the attention of the defendant's construction engineer who was detailed by the Supervising Architect of the Treasury Department to supervise the work. It was also discovered during these tests that no penetration for piles could be secured below the bottom of the foundations under the boiler room. The piling under this boiler-room section had to be eliminated.

The plans provided for piles under pits for the elevators, sumps, and other places. The pits were so low that piles of two feet in length could only be used sometimes and it was determined by the contracting officer to omit piling in the pits and substitute lowered footings.

The construction engineer admits that the conditions revealed at the site as the result of the test piles could not have been foreseen and were only disclosed by the actual driving

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of the piles and the special corroborative borings. The conditions discovered as a result of these test borings were so radically different from those depicted on the drawings that only one pile of the estimated length, 27 feet 6 inches, was driven. Only 55.5% of the total footage was driven and of the estimated number of piles (10,538) 1,506 were omitted.

Sections 192 and 193 of the specifications made provision for adjustment of the contract price upon determination of the actual length of the piles. The sections read as follows:

> 192. It is estimated that the average length of the piles will be twenty-seven feet six inches (27′ 6″) in place, measured from the tip to the cut-off lines indicated on the drawings. Should the aggregate length of the total number of piles driven, where so measured, be greater or less than aggregate length estimated, adjustment will be made in the contract price on the following basis:
>
> 193. $1.85 per linear foot additional to the contract price for the number of feet in excess of the aggregate linear feet estimated, or $1.25 per linear foot deduction from the contract price for the number of feet less than the aggregate linear feet estimated. The cost or credit for any increase to or decrease from the total number of piles shown on the drawings shall be at these unit prices per linear foot.

The contracting officer admits that these sections are inserted to cover a reasonable variation and not an unusual and extraordinary condition. The conditions encountered were grossly in variance with the drawings and specifications and resulted in a high overrun which was not anticipated by either party when the drawings and specifications were made by the defendant and the bid entered by the plaintiff.

Article 4 of the contract provides for changed conditions, and reads as follows:

> ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investi-

gate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

Article 3 of the contract provides for changes and reads as follows:

> ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

When the condition encountered was called to the attention of the contracting officer, he extended the time in which a claim could be made and, when the claim was submitted by the contractor for an equitable adjustment under Article 3 of the contract instead of under Section 193 of the specifications, the matter was referred to the Comptroller General for decision with a statement of facts showing unforeseen conditions as a result of the tests and with a recommendation for equitable adjustment. The Comptroller General held that Section 193 of the specifications governed and so informed the contracting officer. As a result of this decision the plaintiff had deducted from his contract price the sum

of $161,266.25, whereas, if the plaintiff had had an equitable adjustment, there would have been only a deduction of $93,-089.27 for the footages of piling not driven or a difference of $68,176.98.

In our opinion, the contractor was entitled to have the contracting officer construe the contract and arrive at a determination of the facts as found by him after the unforeseen conditions had been brought to his attention by the plaintiff. There is no provision in the contract allowing the Comptroller General the right to construe the rights of the parties under the contract either in fact or law.

The contracting officer made a finding of fact to the Comptroller General in which he held the conditions were in variance and radically different from those on which the plans were drawn and the specifications made and on which the plaintiff had based its bid. Under these circumstances, under the provisions of the contract article 3 applies and not the provisions of the specifications under sections 192 and 193.

In the case of *Hollerbach* v. *United States*, 233 U. S. 165, 171, the court held:

> A government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument.

See *The Rust Engineering Co.* v. *United States*, 86 C. Cls. 461.

The work was completed by the plaintiff and accepted but there was deducted as a credit to the Government the sum of $161,266.25, according to the interpretation placed upon the contract by the Comptroller General. This was manifestly a wrong construction of the contract. An equitable adjustment would have resulted in a deduction of only $93,089.27 instead of $161,266.25.

Plaintiff is entitled to recover the sum of $68,176.98. It is so ordered.

Williams, *Judge*; Littleton, *Judge;* and Green, *Judge*, concur.

Whitaker, *Judge*, took no part in the decision of this case.

THE F. W. SICKLES COMPANY v. THE UNITED STATES

[No. 43168. Decided March 4, 1940]

On the Proofs

Income tax; forgiveness of indebtedness.—Where taxpayer was insolvent before forgiveness of indebtedness to them by certain stockholders and was insolvent after such forgiveness, inclusion by the Commissioner of the amount of said indebtedness as taxable income was erroneous.

The Reporter's statement of the case:

Mr. Dwight Rorer for the plaintiff. *Smith, Moore & Lucas* were on the brief.

Mr. D. F. Hickey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a corporation of the State of Massachusetts, with its principal office at Springfield, Massachusetts.

2. On or before June 15, 1930, plaintiff filed in the office of the Collector of Internal Revenue at Boston, Massachusetts, its income tax return for the fiscal year ending March 31, 1930, and paid the taxes of $5,363.55 shown thereon on the dates and in the amounts set forth below:

June 19, 1930	$1,340.89
September 18, 1930	1,340.89
December 10, 1930	1,340.89
March 19, 1931	1,340.88

No part of the taxes so paid has since been returned or refunded or credited to or for the account of plaintiff.

3. In its return for the fiscal year mentioned, plaintiff claimed as deductions for net losses the sum of $8,152.47 for the fiscal year ending March 31, 1928, and $14,199.48 for the fiscal year ending March 31, 1929, a total of $22,351.95. It reported net income of $47,676.01 after the deduction of the aforesaid total of net losses, and paid tax thereon in the amount of $5,363.55. The Commissioner of Internal Reve-

nue determined income for the taxable year 1930 at $68,-348.43, which figure is stipulated to be correct. From this amount he only allowed the deduction of the net loss of $7,516.57 for the year ending March 31, 1928, thus determining taxable net income for the year 1930 to be $60,831.86. The tax on this net income was $6,843.59, or $1,480.04 in excess of the tax previously assessed and paid for that period.

4. The plaintiff had reported the above-mentioned total of $22,351.95 in its return for the fiscal year ending March 31, 1929, as its net loss for that period, having included in that amount the net loss of $8,152.47 claimed for the fiscal year 1928. The net loss attributable to the year 1929 itself was $14,199.48. The Commissioner of Internal Revenue, however, determined that plaintiff should have reported net income for that fiscal year in the amount of $6,135.05. This net income for 1929 was absorbed by a net loss for 1927 in the amount of $12,551.25, and therefore no tax was assessed for 1929.

5. In determining plaintiff's net income for the taxable year 1929 at the amount above-stated, the Commissioner made a total adjustment of $20,334.53. Such adjustment was made on account of a cancellation of an indebtedness in the net amount of $19,752.83, and a disallowance of depreciation in the amount of $581.70. The depreciation item is not in controversy. It is stipulated that if plaintiff's income is to be adjusted in any amount on account of the cancellation of this indebtedness, the amount determined by the Commissioner is the correct amount.

6. The Commissioner of Internal Revenue assessed additional Federal income taxes in the amount of $1,480.04 against plaintiff for the year ending March 31, 1930, which additional taxes plaintiff paid on June 28, 1932, together with interest thereon of $176.77. No part of this additional tax and interest has since been returned or refunded or credited to or for the account of plaintiff.

7. On June 4, 1934, plaintiff filed its claim for refund in the amount of $1,480.04, plus interest of $176.77, alleging that a net loss for the fiscal year ending March 31, 1929, in the amount of $13,617.78 ($14,199.48–$581.70) was deductible in computing net income for the fiscal year ending March 31, 1930.

8. The Commissioner disallowed plaintiff's claim on Schedule No. 21910. Notice of such disallowance was sent to the plaintiff by registered mail on December 19, 1934.

9. In the first part of the fiscal year ending March 31, 1929, the stock of The F. W. Sickles Company was held by F. W. Sickles 15 shares, A. L. Bausman 15 shares, G. E. Boynton 15 shares, H. C. Hyde 15 shares, and R. F. Sickles 5 shares. On June 7, 1928, the stock held by Bausman, Boynton, and Hyde was acquired by F. W. Sickles and his wife Mildred F. Sickles.

On that date, June 7, 1928, the plaintiff was indebted to Bausman, Boynton, and Hyde in the aggregate amount of $22,115.79. This indebtedness was satisfied by plaintiff's notes aggregating $1,000.00, and by the payment to them of $830.59 in cash, and the assignment to them of all of plaintiff's accounts receivable, on condition that they should assume and discharge plaintiff's accounts payable.

10. Prior to June 7, 1928, the plaintiff had been engaged in the manufacture of spider web or diamond weave coils for radios, in which it had been unsuccessful financially. Shortly prior to that date F. W. Sickles and his son Royal F. Sickles determined to abandon and did abandon the manufacture of the spider web or diamond weave coils, and to undertake the manufacture of solenoid coils. The machinery, inventory, and patents on hand on June 7, 1928, were useful only for the manufacture of spider web or diamond weave coils, and were of but little use in the manufacture of solenoid coils. The value of the inventory, patents, and machinery on hand on June 7, 1928, after the discharge of the indebtedness to Bausman, Boynton, and Hyde, was not in excess of $500.00, and these were all of plaintiff's assets. On that date plaintiff had liabilities of $1,750.00. Plaintiff was insolvent after the discharge of its liabilities to Bausman, Boynton, and Hyde on June 7, 1928.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff in computing its net income for its fiscal year ending March 31, 1930, deducted a net loss of $22,351.95, which included a net loss of $14,199.48, which it claimed it

had sustained for the fiscal year ending March 31, 1929. In computing this net loss the plaintiff did not include in its income the sum of $19,752.83 on account of the forgiveness of an indebtedness owed by it to three of its stockholders, Bausman, Boynton, and Hyde. The Commissioner in auditing plaintiff's return concluded that this amount was income to the plaintiff for the year 1929 and, therefore, that it was not entitled to the deduction of the net loss claimed by it for this year.

On June 7, 1928, the above named stockholders forgave plaintiff its indebtedness to them aggregating $22,115.79, in consideration of the payment to them of all the cash on hand and the cash plaintiff had been able to borrow, the assignment to them of all of plaintiff's accounts receivable, and the execution to them of plaintiff's notes aggregating $1,000.00. Plaintiff's accounts payable were assumed by said stockholders. The Commissioner of Internal Revenue treated the net amount of the indebtedness forgiven as income and on account thereof added to plaintiff's gross income the sum of $19,752.83.

The plaintiff was insolvent prior to this forgiveness of its indebtedness. It is agreed that if it were insolvent after the indebtedness was forgiven, no income accrued to it. The sole issue, therefore, is whether or not plaintiff was still insolvent after this indebtedness was forgiven.

Prior to this transaction plaintiff had been engaged in manufacturing spider web or diamond weave coils for radios. The business had proven financially unsuccessful and it was for this reason that Bausman, Boynton, and Hyde desired to retire. Prior to their retirement F. W. Sickles and his son had determined that they could not make any money out of the manufacture of spider web or diamond weave coils, and started the manufacture of solenoid coils. The machinery and material on hand at that time were not adapted to the manufacture of solenoid coils and were, therefore, of no further use to the plaintiff in its business. All the testimony introduced shows that they did not have a value either to the plaintiff or on the market in excess of $500.00. The patents, plaintiff's only other asset, were of no value. Plaintiff's liabilities were $1,750.00. Plaintiff was, therefore, insolvent

after the forgiveness of the indebtedness, and under the authorities plaintiff thereby derived no income therefrom. *Burnet, Commissioner,* v. *John F. Campbell Co.*, 50 F. (2d) 487; *Commissioner of Internal Revenue* v. *Simmons Gin Co.*, 43 F. (2d) 327; *Dallas Transfer and Terminal Warehouse Co.*, v. *Commissioner*, 70 F. (2d) 95; *Porte F. Quinn*, 31 B. T. A. 142; *Madison Railways Company* v. *Commissioner*, 36 B. T. A. 1106.

It results, therefore, that the inclusion in plaintiff's income for the fiscal year ending March 31, 1929, of the sum of $19,752.83 on account of the forgiveness of this indebtedness was erroneous. If this amount be excluded, plaintiff suffered a net loss for this year of $14,199.48, less $581.70 depreciation erroneously deducted, or $13,617.78. This amount it is entitled to deduct from its income for the fiscal year ending March 31, 1930. This deduction results in an overassessment of taxes for this fiscal year of $1,480.04, plus interest thereon of $176.77.

Plaintiff is, therefore, entitled to recover the sum of $1,656.81, with interest. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

HOWARD BRATTON, JR., v. THE UNITED STATES

[No. 43445. Decided March 4, 1940]

On the Proofs

Appointment to Government position.—Decided upon the authority of *Keim* v. *United States*, 177 U. S. 290, 293.

The Reporter's statement of the case:

Mr. James R. Kirkland for the plaintiff.

Mr. Paul A. Sweeney, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Howard Bratton, Jr., plaintiff, is a citizen of the United States and a resident of the State of Maryland. He served

Per Curiam

in the armed forces of the United States during the World War as a commissioned officer and airplane pilot, and received an 18-percent disability in actual war service.

2. Plaintiff is an honorably discharged soldier from the military service of the United States and is thereby entitled to special benefits under various acts of Congress, Executive orders, and the regulations of the United States Civil Service Commission, including the Act of August 15, 1876 (17 Stat. 169), the Act of August 23, 1912 (37 Stat. 413), the Executive order of June 4, 1925, and Civil Service Rule XII, Section V.

3. Plaintiff, on November 9, 1934, as the result of a competitive examination, became a classified Civil Service employee and was appointed to a position as storekeeper-gauger CAF–5, at $2,000 per annum, in the Alcohol Tax Unit, Treasury Department.

4. On June 30, 1935, plaintiff was "discharged without prejudice, reduction in force." Such separation was incident to a general reduction in force and was subsequent to a report of the District Supervisor, Baltimore, Maryland, to the effect that plaintiff was not adapted to the satisfactory performance of the duties of storekeeper-gauger.

5. Plaintiff has introduced no evidence, oral or documentary, to show that his dismissal from the service was improper.

The court decided that the plaintiff was not entitled to recover, in an opinion *per curiam*, as follows:

The facts in this case are governed by the case of *Keim* v. *United States*, 177 U. S. 290, 293, in which the Supreme Court held:

> The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power.

See also *Eberlein* v. *United States*, 257 U. S. 82, and *James B. Bennett* v. *United States*, 89 C. Cls. 322.

The petition is dismissed. It is so ordered.

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HAZEL V. KIRKENDALL v. THE UNITED STATES

[No. 43504. Decided March 4, 1940]

On the Proofs

Income tax; recovery of money illegally received by the Government; jurisdiction.—When the Government has illegally received money which is the property of a citizen, and when this money has gone into the Treasury of the United States, there arises an implied contract on the part of the Government to make restitution to the rightful owner under the Tucker Act and the Court of Claims has jurisdiction to entertain the suit.

Same; admission under duress.—An admission made by a prisoner, aged and in ill health, after hours of police questioning, is stamped with every earmark which a court of law will not accept as truth. *Brown, et al.* v. *Mississippi*, 297 U. S. 278; *Chambers, et al.* v. *Florida*, 309 U. S. 227.

Same; money wrongfully confiscated.—Where money taken by the police from a prisoner and turned over to the Postal Inspector under a subpoena to be used as evidence, was later under a warrant of distraint on the Postal Inspector, taken by the Collector of Internal Revenue and applied as a credit against an income tax assessment alleged to be due by a third party, and where the facts show that the money so taken was not the property of the taxpayer, it is held that the money so taken was wrongfully confiscated.

Same; claim for refund.—Where money wrongfully confiscated by the Government was applied as a credit against an income tax assessment alleged to be due by a third party, it is held that a claim for refund by the rightful owners of the property would not be an appropriate action for said owners to take, since it was not claimed that said owners had paid or had assessed against them any taxes.

Same.—A refund claim is an appropriate action under the revenue statutes to recover money paid as taxes when such claim is made by the party who paid the tax.

The Reporter's statement of the case:

Mr. Thomas V. Sullivan for the plaintiff. *Mr. Frank E. McAllister* was on the brief.

Mr. J. H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. The plaintiff is a resident of Chicago, Illinois, and she is the duly qualified Administratrix of the Estate of her deceased husband, James F. Kirkendall.

2. Plaintiff had been married to James F. Kirkendall for thirty-six years. They did not have any children.

For a quarter century or more prior to the latter part of 1933, plaintiff's husband was a travelling salesman for a clothing concern. On April 8, 1935, eleven days before his death, he was arrested for the alleged fraudulent use of the mail in connection with the "Sir Francis Drake Estate."

3. There is little in the record as to the character of the "Sir Francis Drake Estate." It apparently was a venture to collect money chiefly from contributors in this country to settle an alleged estate in England on the theory that the estate would be distributed among the contributors in proportion to the amount of money paid in by them. It was held out to them that for each dollar invested there would be a return of $1,000 to $5,000. About ten years before his death Kirkendall and plaintiff, in the honest belief that the estate actually existed, contributed thereto from $1,600 to $1,700 between them.

4. The manager of the Drake Estate was one Oscar M. Hartzell. Solicitations were made through the mails and other channels. The number of subscribers ran into the thousands and contributions were sent in money, checks, and postoffice orders to Hartzell at the Croydon Hotel, Chicago, Ill.

5. The latter part of the year 1933, Kirkendall gave up his position as travelling salesman, having been employed by Oscar M. Hartzell at a weekly stipend of between $30 and $40, to devote his time to the Drake Estate in the capacity of forwarding money, received in Chicago from contributors all over the country, to one C. Ray in New York City. C. Ray, it developed, was an alias for Canfield Hartzell, a brother of Oscar M. Hartzell. As late as the first part of September 1934, Kirkendall handed some of the money received in Chicago for the Drake Estate to Oscar M. Hartzell in person.

Reporter's Statement of the Case

6. The Chicago activities of this venture were headed by one Yant, with an office in the Croydon Hotel. Kirkendall appeared at this hotel in connection with the collection of this money almost daily. Yant issued the receipts or notes to the contributors and turned the contributions over to Kirkendall. Kirkendall deposited the checks and money orders in his checking account in the bank, and, when they were collected, would draw a check for their total sum and place the currency in an envelope in his safe deposit box at the bank.

7. Kirkendall had a safety deposit box in a Chicago bank to which both he and plaintiff carried a key and had access. In this safety deposit box was kept both the Kirkendall money and the money from contributors to the Drake Estate. The money contributed to the Drake Estate was kept in a large envelope separate from the Kirkendall money; and when there was an accumulation of $4,000 to $6,000 of Drake Estate money, it was forwarded to New York or London. On the morning of April 8, 1935, Kirkendall forwarded $4,000 in currency, the entire contents of the Drake Estate envelope in the safety deposit box, by express to C. Ray, New York.

8. About noon on April 8, 1935, Yant, Kirkendall, and another man were arrested in the Croydon Hotel by Chicago police for complicity in the Drake Estate. They were taken to the detective bureau. Thereafter during the early afternoon of April 8, 1935, Kirkendall told the police of his safety deposit box and accompanied the police to the bank, and the money in the safety deposit box consisting of $13,800 in currency and 324½ English pounds was taken by the police to the detective bureau. From 5 o'clock that afternoon until 1:57 A. M. the next day Kirkendall was rigorously and tirelessly questioned by the police, a postal inspector, and an assistant state's attorney until he was exhausted. Upon the arrival of the postal inspector and assistant state's attorney, questions to Kirkendall and answers by him were taken down by a shorthand reporter and transcribed. Some of his answers as they appear in the transcript, relative to his ownership of the contents of the safety deposit box, were in conflict with his claims to ownership

thereof made both before his arrest and shortly following the recording of said answers.

The next day this money was turned over by the police under subpoena to a postal inspector to be used as evidence in the trial against the promoters of the Drake Estate. Thereafter the collector of internal revenue prepared and filed a return for taxes for Oscar M. Hartzell for the year 1934 disclosing a large tax due the Government, levied the tax under a warrant of distraint on the postal inspector, obtained from him the $13,800 and 324½ English pounds which had been taken by the police from the safe deposit box, and applied this money as a credit to the outstanding assessment against Hartzell for the year 1934. The English pounds were converted into American currency by the Bureau of Internal Revenue at the rate of exchange of $4.90 per pound, or a total of $1,590.05.

Oscar M. Hartzell was convicted of fraud in connection with the Drake Estate, for which he was serving time in the penitentiary for some time prior to the arrest of Kirkendall.

9. At the time of his arrest Kirkendall was 66 years of age and in frail physical condition. He was suffering from diabetes, chronic myocarditis, uraemia, and prostate condition. The day after his arrest he was transferred to the prison hospital and remained there until five o'clock in the afternoon of April 19, 1935, at which time he was released on bond. Kirkendall died at 8:25 P. M. that same day.

10. The plaintiff had inherited about $1,700 from her mother and most of this she invested in the 324½ English pounds which were kept in the safety deposit box. Before the depression, Kirkendall had assets amounting to $25,000. Of this, he lost about one-fourth as a result of the depression. Prior to his arrest Kirkendall had converted his assets into cash which was kept in the safety deposit box. He also had a limited checking account.

Kirkendall had saved some money as traveling salesman, had some life insurance, and some United States Bonds. On October 29, 1934, Kirkendall cashed United States Bonds and received $5,104.76. Kirkendall had taken out four life insurance policies—two for $10,000 each, one for $5,000 and

another for $3,000, all of which were surrendered by him on or before February 20, 1933. On these policies he received cash as follows:

October 10, 1908	$862.39
September 3, 1925	1,925.50
January 26, 1928	2,470.00
September 10, 1928	274.45
February 26, 1932	2,285.97
February 20, 1933	840.70
Total	8,659.01

11. The contents of the safety deposit box, which was taken possession of by the Chicago police on April 8, 1935, was the property of James F. Kirkendall and of the plaintiff.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The plaintiff brings this action individually and as administratrix of the estate of James F. Kirkendall. The action is based on an implied contract for the recovery of money appropriated by the defendant under legal forms and applied to the unpaid taxes of another person.

For many years there was solicited through the mails, and otherwise, subscriptions for the prosecution of a claim to collect a large estate supposed to be in England and known as the "Sir Francis Drake Estate." Promise was held out to those who contributed to receive a return in a thousand fold for each dollar subscribed. The prime mover in this venture was one Oscar M. Hartzell. Thousands of credulous people, believing in the existence of this estate and desirous of acquiring wealth in this manner, sent contributions in money, checks, and post-office orders to Oscar M. Hartzell at the Croydon Hotel in Chicago, Illinois.

Plaintiff and her husband honestly believed in the existence of this estate and contributed between sixteen and seventeen hundred dollars between them some ten years before his demise.

Plaintiff's husband, James F. Kirkendall, had been a travelling clothing salesman for many years. For two years before his death he had not been employed as a travelling salesman but had been engaged by Hartzell at a weekly stipend of

between thirty and forty dollars for handling the funds which came to Hartzell. The checks and money orders were turned over to Kirkendall and he deposited them in his checking account in the bank. When they were collected he would draw the amount out of his checking account and place the money in an envelope in his safe deposit box at the bank. When these collections amounted to a substantial sum he would remit the amount to London or New York. The money received by Kirkendall for this fund was never commingled with his own funds in the safe deposit box.

On April 8, 1935, police officers of the City of Chicago raided the Croydon Hotel and arrested James F. Kirkendall and others in connection with this venture. Prior to Kirkendall's arrest, Oscar M. Hartzell had been arrested, tried, and convicted for the fraudulent use of the mail in connection with the Drake Estate and was serving a sentence in the penitentiary.

On the morning of his arrest, Kirkendall had remitted to New York $4,000, being all the collections of the Drake Estate in his safe deposit box.

After Kirkendall's arrest by the police officers he informed them of his safe deposit box and was taken by the officers to the bank where the contents of the box, consisting of $13,800 in currency and 324½ English pounds, were confiscated and taken to the Detective Bureau. Following the appropriation of his money by the police, Kirkendall was subjected to an exhausting and almost inhuman examination by the police authorities. This continued from about five o'clock in the afternoon until the Assistant State's Attorney and the Postal Inspector were brought in and Kirkendall's statement was taken down at 1:57 the next morning.

At the time of his arrest Kirkendall was sixty-six years of age and in very frail physical condition. He was suffering from diabetes, chronic myocarditis, uraemia and prostate condition. He was transferred by the police to the jail hospital after nine hours of gruelling questioning. Kirkendall was in the jail hospital until five o'clock in the afternoon of April 19, 1935, at which time he was released on bond.

Later the money obtained from Kirkendall by the police was turned over to the Postal Inspector under a subpoena to

be used as evidence in the trial of the promoters of the Drake Estate. Following the acquisition of this money by the postal inspector, the collector of Internal Revenue prepared and filed a return for taxes for Oscar M. Hartzell for the year 1934, which return disclosed a large tax due the Government. The collector then levied the tax and under a warrant of distraint on the post-office inspector obtained from him $13,800 and 324½ English pounds, which had been taken by the police authorities from the safe deposit box of Kirkendall, and applied this amount as a credit to the outstanding assessment against Hartzell for the year 1934.

A mere recital of the facts shows that the money taken from the Postal Inspector and applied to the taxes of Hartzell was not the taxpayer's personal property. The defendant knew at the time, or had reason to know, that Hartzell was serving a sentence for the fraudulent use of the mail in the collection of money for the Drake Estate. This fund either belonged to Kirkendall or to those from whom it had been collected. The action of the Government, in the conviction of Hartzell and the arresting of these other parties on a charge of conspiracy for the fraudulent use of the mail, stamps the fund as not belonging to Hartzell and it could not under any conceivable means be applied to the taxes due by him.

Plaintiff brings this action alleging that the money so taken belonged to her husband and herself and was wrongfully confiscated and applied to taxes due by another.

The only direct evidence in the case as to the ownership of this money is the testimony of the plaintiff. She testified that part of it was derived by her from her mother's estate and the balance was obtained by her husband through loans on life-insurance policies and cash-surrender values of life-insurance policies. Plaintiff's statement is corroborated by the evidence obtained from the life insurance companies which shows that over a number of years plaintiff's husband took out policies and subsequently borrowed on them, and, in other instances, after carrying policies for years, obtained their surrender values.

The only evidence contradictory to plaintiff's testimony is the so-called admission made by Kirkendall after his

arrest and after he had been subjected for hours to the reprehensible methods and tactics of the police officers after turning over the contents of his safe deposit box.

Subjecting this sick, old man to hours of police questioning and wringing from him an admission stamps the so-called admission with every earmark which a court of law will not accept as the truth. After hours of questioning Kirkendall was placed in the jail hospital and remained in the hospital until he was released under bond on the afternoon of April 19, 1935. The evidence shows that he died three and one-half hours after his release. See *Brown et al.* v. *Mississippi*, 297 U. S. 278, and *Chambers, et al.* v. *Florida*, decided by the Supreme Court February 12, 1940. (309 U. S. 227.)

The defendant has in its possession money to which it is not entitled and which has been wrongfully obtained from the plaintiff and her husband.

The defendant contends that this money, having been applied to taxes due by Hartzell under the Revenue Law and no timely refund claim having been made by the plaintiff, or her husband, cannot now be recovered. It is only necessary to say that a refund claim is an appropriate action under the revenue statutes to recover money paid as taxes when made by the party who paid the tax. There is no claim that either Kirkendall or the plaintiff paid, or had assessed against them, any taxes, and certainly a refund claim would not have been an appropriate action for them to take.

When the Government has illegally received money which is the property of an innocent citizen and when this money has gone into the Treasury of the United States, there arises an implied contract on the part of the Government to make restitution to the rightful owner under the Tucker Act and this court has jurisdiction to entertain the suit.

As was said by the Supreme Court in the case of *United States* v. *State Bank*, 96 U. S. 30, 35, 36:

> * * * An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial. * * *
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> * * * * *

Syllabus

> But surely it ought to require neither argument nor authority to support the proposition, that, where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party.

See also *Dooley* v. *United States*, 182 U. S. 222; *Basso* v. *United States*, 239 U. S. 602; and *Bull* v. *United States*, 295 U. S. 247.

The Government has taken the money of the plaintiff and her husband and it is only common honesty that it should be returned. The United States is required to be honest with its citizens just as much as its citizens are required to exercise common honesty with their Government.

Plaintiff is entitled to recover $13,800, as administratrix, and 324½ English pounds, individually. The English pounds were converted into American currency by the Internal Revenue Bureau at the rate of exchange at that time, in the amount of $1,590.05.

Judgment will be entered in favor of the plaintiff individually in the amount of $1,590.05, and as administratrix of the Estate of James F. Kirkendall in the sum of $13,800.

It is so ordered.

WHITAKER, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

ARTHUR PELZER v. THE UNITED STATES

[No. 43923. Decided March 4, 1940]

On the Proofs

Income tax; exclusion of gifts made to trust funds for the benefit of individual donees.—Plaintiff on July 14, 1932, executed an instrument creating an irrevocable trust for the benefit of the trustor's living grandchildren (eight in number being specifically named) and other grandchildren who might thereafter be born, and providing that for ten years from the date of its execution the income from the trust fund should be accumulated and invested, and that at the expiration of the 10-year period the trustee should pay a distributive equal share of

the income to each grandchild who had reached 21 years of age, with further provisions for the subsequent disposition of the trust fund.

Plaintiff on December 28, 1934, executed an instrument creating an irrevocable trust, the income from which was to be paid to the trustor's wife and three daughters in equal proportions, with further provisions for the disposition of the trust income upon the death of the wife and daughters.

Gifts were made to the "children's trust" in the years 1932, 1933, 1934, and 1935 and to the trustee of the "adult trust" in 1934.

Held:

(1) That the gifts set up by plaintiff in the two trusts were gifts of present interests in the property transferred; and

(2) That each beneficiary named in the respective trust instruments is a donee within the provisions of section 504 (b) of the gift-taxing statute of 1932, and that the taxpayer is entitled to a $5,000 exclusion in each of the years 1932, 1933, 1934, and 1935 for each of the gifts made in trust for the benefit of the eight named and living grandchildren, and for the year 1934 for each of the gifts made in trust for the benefit of the taxpayer's wife and three daughters.

The Reporter's statement of the case:

Mr. Robert A. Littleton for the plaintiff.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Robert N. Anderson* was on the brief.

The court, upon the stipulation of facts and the evidence, made the following special findings of fact:

1. The plaintiff, Arthur Pelzer, is a citizen of the United States and a resident of Montgomery, Alabama.

2. On July 14, 1932, the plaintiff executed a trust instrument, which is hereinafter referred to as the "children's trust." This instrument, after reciting that the trustor (the plaintiff) was transferring certain personal property to the trustee in trust for the use and benefit of the trustor's living grandchildren (eight in number, being specifically named) and other grandchild and/or grandchildren of the trustor as might hereafter be born during the life of the trust, provided: first, the trustee was to manage the property, to sell and to invest and reinvest the proceeds from sales with the provision that he should consult with the trustor about in-

vestments and changes in and disposition of the trust property, it being distinctly agreed, however, "that by this it is not intended, nor shall it be construed to be intended, that the Trustor shall have any right to change any of the terms of this instrument, or distribution of the trust estate, nor any right to revoke or change any provisions hereof, nor be entitled to receive any economic, financial, or other benefit from the trust estate." It is further provided that the trustee shall collect the income and pay expenses and distribute the net income in the manner thereinafter stated.

Paragraphs 2, 3, and 4 (Exhibit A) of the trust instrument are as follows:

> 2. For a period of ten years from date hereof the net income from this trust estate shall by the Trustee be accumulated and invested and reinvested from time to time. At the expiration of said ten years the Trustee shall thereafter pay in semiannual, quarterly, or monthly installments (whichever is more practicable) an equal grandchild's distributive share of the net income from this estate to each of the Trustor's now living grandchildren whose names are set out above, who may be then living and be twenty-one years of age or over, said payments to continue to each during his and/or her respective life; and as and when each of Trustor's remaining grandchildren who are now living, and whose names are hereinabove set out, respectively reaches the age of twenty-one years, the Trustee shall thereafter pay in said semiannual, quarterly, or monthly installments to him and/or her for and during his and/or her respective life an equal grandchild's distributive share of the net income from the trust estate; but, in the meantime, and during the respective minority of the remaining of the hereinabove specifically named now living grandchildren, all net income not required to be paid out under the terms hereof to adult grandchildren and to or for grandchildren hereafter born, shall be invested and reinvested according to the terms of this instrument to the end that the net trust income may be accumulated during the period authorized by law.
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> Should the Trustor have other grandchildren born hereafter during the life of this trust, then each and all of said hereafter born grandchildren shall be entitled to participate in the trust estate equally with the other grandchildren hereinabove named, and to receive an equal grandchild's distributive share as herein provided, except as to distributions of net income that may have

been made prior to the birth of such hereafter born grandchild or grandchildren; provided, however, and except further that for ten years from the date hereof, the net income from this estate shall be accumulated and invested and reinvested as hereinabove provided, and subject further to the terms of this trust. At the expiration of ten years from date, then as to any and all of Trustor's grandchildren who may be hereafter born and then living, the Trustee shall thereafter during the life of this trust pay in said periodical installments to or for each of said now unborn, but hereafter born grandchildren if then living, an equal grandchild's distributive share of the net income from this trust estate. Such payment of net income shall be made direct to each after born grandchild when and after he or she reaches twenty-one years of age, and during the minority of such after born grandchild may be paid out or expended directly by the Trustee for the support, maintenance, comfort, and education of such grandchild, or be paid by the Trustee to the mother thereof for said purposes.

3. Should any of the grandchildren of Trustor die during the life of this trust without leaving issue, then said deceased grandchild's distributive share of the net income hereunder shall belong to his and/or surviving brother and/or sister, if any, and if none, then to the other grandchildren per stirpes, subject to the terms of this trust; but should any of the grandchildren of Trustor die leaving issue, then said issue shall be entitled to receive the deceased grandchild's share of the income per stirpes, subject to the terms of this trust. During the life of this trust, all net income payable by the Trustee to or for the issue of a deceased grandchild shall be paid by the Trustee to or for him at the time and in the manner hereinabove at the end of the preceding paragraph provided in the case of a grandchild.

4. This trust shall continue, and the income therefrom be distributed as hereinabove provided, until twenty-one years after the death of the last survivor of all of Trustor's grandchildren who are now living, and whose names are set forth hereinabove, at which time it shall cease and determine, and the corpus, with any accumulation, shall then be distributed free from this trust among such, if any, of Trustor's grandchildren born hereafter who may at that time be living (each such living grandchild to receive a grandchild's equal share), and the issue of all deceased grandchildren, the issue of a deceased grandchild, to receive the deceased parent's share per stirpes.

The remaining provisions of the trust instrument deal with the substitution of a trustee if the trustee named resigned or died, the giving of bond by the trustee, etc., which provisions are not material to a decision of this case.

3. On March 15, 1933, the plaintiff filed a gift tax return for the year 1932, showing total gifts for that year in the amount of $50,000 on account of transfers made by the plaintiff to the trustee of the children's trust during that year and claiming a specific exemption of $50,000, resulting in no net gifts and no gift tax for the year 1932. In an audit of this return the Commissioner of Internal Revenue determined the total gifts for 1932 to be $49,998.83 and allowed a specific exemption in a like amount, resulting in no net gifts and no gift tax for that year. Plaintiff was notified of this audit on January 18, 1935.

4. On March 15, 1934, plaintiff filed a gift tax return for the year 1933, showing total gifts in the amount of $18,000 representing three gifts of $6,000 each to plaintiff's daughters, Frances P. Doe, Elizabeth K. Webber, and Alice E. Joseph, from which was deducted three exclusions of $5,000 each, resulting in gross gifts for that year of $3,000 from which was deducted a specific exemption of $3,000, resulting in no net gifts and no tax due for that year.

When the Commissioner of Internal Revenue audited plaintiff's gift tax return for the year 1933 he determined that the total gifts made by plaintiff for the year 1933 amounted in the aggregate to $47,800, and that in addition to the three gifts of $6,000 each to Frances P. Doe, Elizabeth K. Webber, and Alice E. Joseph, reported in said return, the amount of $29,800 transferred to the trustee of the children's trust should be included in the 1933 gifts. The Commissioner, in said audit for 1933, allowed three exclusions of $5,000 each; and computed gross gifts by plaintiff for 1933 in the amount of $32,800 from which he allowed a specific exemption of $1.17, being the unused portion of the specific exemption of $50,000 carried over from the year 1932.

As a result of the foregoing changes made in the plaintiff's gift tax return for the year 1933, the Commissioner determined a gift tax liability against plaintiff for the year 1933 in

the amount of $533.96, plus interest thereon in the amount of $53.54, which tax and interest was paid by plaintiff on November 27, 1935.

5. On December 28, 1934, the plaintiff executed a trust instrument, hereinafter referred to as the "adult trust." This agreement, after reciting that it was an irrevocable trust indenture between the plaintiff as trustor and the trustee by which the trustor transferred certain personal property to the trustee in trust for the use and benefit of the Trustor's wife and daughters (Eva L. Pelzer, his wife, Frances P. Doe, Elizabeth K. Webber, and Alice E. Joseph, his daughters), provided: first, that the trustees should manage the property and should have the right to change or sell and to invest and reinvest the proceeds from the sale but should confer with the trustor about investments and changes in and disposition of the trust property, "it being distinctly agreed between the parties, however, that by this it is not intended, nor shall it be construed to be intended, that the Trustor shall have any right to change any of the terms of this instrument or distribution of the trust estate, nor any right to revoke or change any provision hereof, nor be entitled to receive any economic, financial, or other benefit from the trust estate."

Paragraphs 3 and 4 (Exhibit B), of the trust instrument are as follows:

> 3. The net income from said trust estate shall be paid to the said beneficiaries, Eva L. Pelzer, Frances P. Doe, Elizabeth K. Webber, and Alice E. Joseph, share and share alike, in quarterly installments, adjustments to be made from time to time according to the earnings of the trusts.
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> Upon the death of Trustor's wife, her share of the income shall be divided equally among all of Trustor's grandchildren; and upon the death of any of Trustor's daughters, her share of the income shall go to her children in equal shares. In the event of the death of any grandchild leaving issue, such grandchild's share hereunder shall go to such issue, and if no issue, to such grandchild's heirs at law. Any payment required hereunder to be made to a grandchild, or issue of a grandchild, who may be under twenty-one years of age may be paid by the Trustee to the parent of such grandchild,

if living, for his or her benefit until arrival at age twenty-one; and if the parent of such grandchild is not living, any payment required hereunder may be disbursed by the Trustee in its discretion for the benefit of such grandchild until arrival at age twenty-one; and paid direct thereafter.

4. Said Trust shall continue throughout the lives of the several beneficiaries hereinabove named, and upon the death of any, the share of said deceased beneficiary shall continue in trust for the children or grandchildren of said beneficiary, share and share alike, as set forth herein; that is, the one-fourth share of Trustor's wife shall continue in trust for all the grandchildren of the Trustor, share and share alike, and the one-fourth share of any of the daughters of said Trustor dying shall continue for the children of said daughter, share and share alike; if any, and if none, for her heirs at law, to be finally distributed as hereinafter provided.

Upon arrival of any of the grandchildren of Trustor at the age of twenty-two, said grandchild's grandmother being deceased, or upon her decease thereafter, this trust shall cease and determine as to that grandchild's share of the one-fourth of this trust held for the benefit of Trustor's wife; and said share shall be paid over to said grandchild free of this trust, to the end that upon the arrival of the youngest of Trustor's grandchildren at the age of twenty-two years, said Trustor's wife being deceased, this trust shall cease and determine as to said one-fourth; and similarly, upon arrival of any of the grandchildren of Trustor at the age of twenty-two years, said grandchild's mother being deceased, or upon her decease thereafter, this trust shall cease and determine as to that grandchild's share of the one-fourth of this trust held for the benefit of his or her mother (which shall be an equal share with the other issue of his or her mother); and said share shall be paid over to said grandchild free of this trust, to the end that upon the arrival of the youngest of the issue of the deceased daughter of Trustor at the age of twenty-two years, this trust shall cease and determine as to such deceased daughter's one-fourth. In the event of the death of a daughter leaving no issue, her share hereunder shall go to her heirs at law.

The remaining provisions of the trust deal with the various rights of the trustee, the giving of bond and the substitution of trustee, which provisions are not material to a decision of this case.

6. On March 15, 1935, the plaintiff filed a gift tax return for the year 1934 showing total gifts in the amount of $209,863. Of this amount, $153,060 was paid to the trustee of the "adult trust," $6,000 to each of the trustor's daughters, Frances P. Doe, Elizabeth K. Webber, and Alice E. Joseph, and $38,803 to the trustee of the "children's trust." On this return plaintiff claims specific exclusions of $58,803 and a specific exemption of $37,001.17, resulting in total net gifts of $114,058.83 and a tax of $4,538.82.

On March 14, 1936, plaintiff filed an amended gift tax return for the year 1934 showing total gifts in the amount of $209,863 (the same as shown on the original return) from which was deducted specific exclusions in the amount of $20,000, leaving net gifts for the year of $189,863, resulting in a tax due of $11,403.99. Inasmuch as a tax of $4,538.82 was paid on the original return, this amended return showed an additional tax of $6,865.17, which amount, together with interest of $411.91, was paid on March 14, 1936. The Commissioner in an audit of this return accepted this amended return as filed by the plaintiff as correct.

7. On March 14, 1936, plaintiff filed a gift-tax return for the year 1935 showing the total amount of $39,531.25 paid to the trustee of the "children's trust" and claimed no exclusions and no specific exemption. This resulted in a tax due of $4,743.75, which was paid on that same date. The Commissioner of Internal Revenue in an audit of this return accepted the return as filed by the plaintiff as correct.

8. On July 27, 1937, plaintiff filed a claim for refund of gift tax for the year 1933 in the amount of $587.50. This claim for refund was based on the contention that the gift-tax return for 1932 was incorrect and that plaintiff was entitled to eight specific exclusions of $5,000 each for that year, since in making transfers to the children's trust the plaintiff made a gift to each of his eight living grandchildren; and further that the specific credit of $50,000 was exhausted in 1932 only to the extent of $10,000. This claim alleged further that as to the year 1933 plaintiff was also entitled to eight specific exclusions of $5,000 each, which in addition to the exclusions already allowed would result in no net gifts and no tax due for that year.

When the Commissioner of Internal Revenue acted upon plaintiff's claim for refund for the year 1933, he reopened plaintiff's gift-tax liability for the year 1932 and allowed one exclusion of $5,000 on account of the transfer to the trustee of the children's trust. This allowance resulted in the Commissioner determining gross gifts for 1932 of $44,998.83 from which a specific exemption of $50,000 was allowed, leaving no taxable gifts for that year. The Commissioner also allowed plaintiff an additional exclusion of $5,000 for the year 1933 on account of the transfer to the children's trust in the amount of $29,800. The Commissioner thus allowed a total of four $5,000 exclusions for the year 1933, and by carrying over from 1932 $5,001.17 of the specific exemptions of $50,000 not used in that year, he adjusted the amount of plaintiff's net taxable gifts for 1933 to the amount of $22,798.83.

As a result of the above adjustments the Commissioner determined an overassessment for 1933 in the amount of $270.07, which amount, together with interest of $31.59, was refunded to the plaintiff on October 15, 1937. In a statement attached to the certificate of overassessment it is stated that the plaintiff is entitled to only one $5,000 exclusion in each of the years with respect to the property placed in trust for the grandchildren, since the gifts in so far as the children are concerned are gifts of future interest against which no exclusions are allowable.

On January 17, 1938, the plaintiff was advised that his claim for refund for 1933 was rejected as to any excess over the amount allowed.

9. On July 27, 1937, the plaintiff filed a claim for refund of gift tax for the year 1934 in the amount of $7,277.08, based upon the contention that he was entitled to eight exclusions of $5,000 each on account of the transfer to the trustee for the "children's trust" and four exclusions of $5,000 each on account of the transfer to the trustee of the "adult trust," and in addition to a specific exemption in that year of $37,001.17 not consumed in prior years.

The Commissioner of Internal Revenue in acting on the claim for refund for the year 1934 allowed one exclusion for the transfer to the trustee of the "children's trust," one

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exclusion for the transfer to the trustee of the "adult's trust," and three exclusions for other gifts in that year, making a total of $25,000, which was $5,000 in addition to the amount claimed and allowed on the amended return. (See Finding 6 above.) As a result of these adjustments, the Commissioner reduced the amount of gifts for preceding years from $32,798.83 to $22,798.83 and disallowed the specific exemption, inasmuch as the entire specific exemption of $50,000 had been applied to gifts in the preceding years, resulting in a total tax liability for the year 1934 of $10,449.98.

On October 15, 1937, the Commissioner of Internal Revenue issued a certificate of overassessment to the plaintiff showing an overassessment of $1,011.25, which, together with interest of $99.73, was refunded to plaintiff on that same date. In a statement attached to this certificate of overassessment the Commissioner stated that he was disallowing the additional exclusions claimed on account of the property placed in trust for the benefit of the grandchildren for the same reason that he had disallowed it in 1933. (See Finding 8 above.)

On January 17, 1938, the plaintiff was advised that his claim for refund of gift tax for the year 1934 was rejected as to any excess over the amount allowed.

10. On July 27, 1937, the plaintiff filed a claim for refund of gift tax for the year 1935 in the amount of $4,743.74, claiming that the plaintiff was entitled to eight specific exclusions on account of the transfers made to the trustee of the "children's trust" in that year.

The Commissioner of Internal Revenue in acting on this claim for refund allowed one exclusion of $5,000 for the transfer to the trustee of the "children's trust." As a result of adjustments for preceding years, the Commissioner reduced the amount of gifts for preceding years from $222,-661.83 to $207,661.83, resulting in a total tax liability for the year 1935 of $4,143.75.

On October 15, 1937, the Commissioner of Internal Revenue issued a certificate of overassessment to the plaintiff showing an overassessment of $600, which, together with interest of $58.48, was refunded to the plaintiff on the same date. In a

statement attached to this certificate of overassessment the Commissioner stated that he was disallowing the claim for eight specific exclusions, giving the same reason that he had given for the year 1933.

On January 17, 1938, the Commissioner of Internal Revenue notified the plaintiff by letter that the claim for refund for 1935 was rejected as to any excess over the amount allowed.

11. True copies of the two trust agreements and the certificates of overassessment to which are attached statements of the final audits made by the Bureau of Internal Revenue for each of the years 1932, 1933, 1934, and 1935 are attached to the stipulation as Exhibits A, B, C, D, and E.

The court decided that the plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover gift taxes alleged to have been overpaid for the years 1932, 1933, 1934, and 1935. The facts have been stipulated by the parties and are not in controversy.

The plaintiff executed a trust instrument on July 14, 1932, which is herein referred to as the "children's trust." The instrument recited that it was created for the benefit of the trustor's living grandchildren (eight in number, being specifically named) and other grandchildren that might thereafter be born during the life of the trust. The instrument further provided that for a period of 10 years from the date of its execution the income from the trust fund should be accumulated and invested, that at the expiration of such ten-year period the trustee should pay an equal grandchild's distributive share of the income to each of the grandchildren who were then living and twenty-one years of age or over, and that as each grandchild reached twenty-one years of age the trustees should pay the share of the income to him. If other grandchildren were born during the life of the trust, they were entitled to participate therein on the same basis as the living grandchildren. If any of the grandchildren died leaving issue, his share should belong to his issue, but if he should die without issue his share should go to his surviving brother and/or sister, if any, and if none, then to the other

grandchildren. At the termination of the trust the corpus was to be divided between the grandchildren or their survivors.

On December 28, 1934, plaintiff executed a trust instrument, herein referred to as the "adult trust." The income of this trust was to be paid to the trustor's wife and three daughters in equal proportions. Upon the death of the wife, her share of the income was to be divided equally among the trustor's grandchildren, and upon the death of either of the daughters her share was to go to her children in equal shares. At the termination of the trust the corpus was to go to the grandchildren of the trustor as each of them reached the age of twenty-one years.

In each of these trusts the plaintiff retained no economic interest or legal control over the property transferred, and the trustee acquired no economic interest in the property so transferred, but is charged only with the safekeeping and management of the property transferred for the benefit of the persons named. The plaintiff was powerless to change the terms of the said instruments, regain control of the property transferred, or change the interest of the beneficiaries therein. Also, the trustee is likewise powerless, and the trust instruments are self executing.

During the years 1932, 1933, 1934, and 1935, plaintiff made gifts to the children's trust, and during the year 1934 he made a gift to the trustee of the adult trust.

Plaintiff filed gift-tax returns for the years 1932, 1933, 1934, and 1935. Claims for refund for each of the years involved were duly filed and allowed in part and disallowed in part by the Commissioner of Internal Revenue. In passing on these claims the Commissioner allowed the plaintiff one $5,000 exclusion for each of the gifts to the children's trust and one $5,000 exclusion for the gift to the trustee for the adult trust. The basis of plaintiff's claim for refund and of this suit is that the plaintiff was entitled to eight $5,000 exclusions for each of the gifts for the children's trust and to four $5,000 exclusions for the gifts to the adult trust.

The question for decision is whether the taxpayer is entitled to a $5,000 exclusion in each of the years 1932, 1933,

1934, and 1935, for each of the gifts made in trust for the benefit of eight named and living grandchildren; and for the year 1934 for each of the gifts made in trust for the benefit of the taxpayer's wife and three daughters.

The Commissioner of Internal Revenue holds that in the case of the annual gifts made in trust for each of the named living grandchildren of the taxpayer only one $5,000 exclusion is allowable for each year, and that in the case of the gifts made in 1934 in trust for the taxpayer's wife and three daughters only one $5,000 exclusion is allowable.

Section 501 of the Revenue Act of 1932 (47 Stat. 245) provides as follows:

> (a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.
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> (b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.
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> (c) The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift.

Section 504 of the Revenue Act of 1932 (47 Stat. 247) provides as follows:

> (a) GENERAL DEFINITION.—The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

(b) GIFTS LESS THAN $5,000.—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

It was held by the Board of Tax Appeals in *Seymour H. Knox* v. *Commissioner*, 36 B. T. A. 630, that where the petitioner had created one trust for the benefit of two individuals he was entitled to but one exclusion, the trust being the person constituting the donee within the meaning of the statute. This decision was followed in *Katherine S. Rheinstrom* v. *Commissioner*, 37 B. T. A. 308, and was also followed and the same rule announced in *Edwin B. Cox* v. *Commissioner*, 38 B. T. A. 865. In numerous other cases the Board of Tax Appeals consistently held that there could be but one $5,000 exclusion where there was but one trust indenture, no matter how many donees might be named in each trust indenture.

Recently, however, the Board in the case of *Wilton Rubinstein* v. *Commissioner*, 41 B. T. A. 220, reversed its position and held where property was conveyed to a trustee for the benefit of the donor's wife and three children that four exclusions of $5,000 each should be allowed, basing its decision on *Welch* v. *Davidson*, 102 Fed. (2d) 100; *Robertson* v. *Nee*, 105 Fed. (2d) 651; *Rheinstrom* v. *Commissioner*, 105 Fed. (2d) 642; and *McBrier* v. *Commissioner*, 108 Fed. (2d) 967.

Welch v. *Davidson*, *supra*, was an appeal from the judgment of the federal District Court of Massachusetts, in which judgment was awarded plaintiff for gift taxes paid by the plaintiff for the calendar year 1934. In 1934 the plaintiff and his wife created an irrevocable trust, naming the Old Colony Trust Company as trustee, in which plaintiff transferred certain property for the benefit of his seven children. The instrument provides that upon plaintiff's death the proceeds are to be divided in equal shares, one for each of the seven children of the plaintiff then surviving, and one share for the issue of any child who has died, leaving issue. The trustee is to pay the income of each share to the child for whom it is

held for life, paying one-half of the principal when said child reaches the age of 45, provided that at least ten years have elapsed after the plaintiff's death. The final date of distribution is set at 21 years after the death of the survivor of the plaintiff's children and granchildren living at the time of the establishment of the trust. The District Court, *Davidson* v. *Welch*, 22 Fed. Supp. 726, held that the donor's seven children each took a one-seventh present interest in the *res* of the trust created, and that the donor was entitled to a $5,000 exclusion in respect to each of them. The judgment of the District Court was affirmed.

In *Rheinstrom* v. *Commissioner*, 105 Fed. (2d) 642, the taxpayer transferred personal property to trustees for the benefit of herself and her four children. By the terms of the trust instrument she retained a life interest in 40% of the entire net income. The trustees were directed to pay to her son, Stewart H. Clifford 12½% of the entire net income. They were directed to hold 12½% of such income for the benefit of her son Benjamin B. Clifford, but with the discretion to pay over to him only so much thereof as might to them seem best, and with power to pay all or a portion thereof to his wife "and/or" children; any unexpended portion of such income to be invested for his benefit "and/or" that of his wife and children. The trustees were directed to hold 12½% of such income for the benefit of the taxpayer's son, Arthur F. Clifford, upon the same terms and conditions as were applicable to Benjamin B. Clifford. The trustees were directed to hold 12½% of such income for the benefit of the taxpayer's daughter, Katherine Clifford, with discretion to pay over only so much of the income to her as to them seemed best, and to invest any unexpended balance for her benefit. The remaining 10% of the net income was to be accumulated, invested, and held "as a reserve fund, with absolute power and discretion in said trustees to pay over to" the taxpayer "during her lifetime, such part, if any, of this 10% of the entire net income of said trust, and accumulations, if any, thereon, as may to said trustees seem best, and with absolute power and discretion in said trustees, after the

death of" the taxpayer, "to pay over to the children of" the taxpayer, "or to their successors in interest as hereinafter provided, such part, if any, of this 10% of the entire net income of said trust and accumulations, if any, thereon, as may to said trustees seem best. * * *"

In her gift-tax return for the year 1934 the taxpayer excluded $20,000 by virtue of Sec. 504 (b) on the theory that she had made four gifts in creating the trust, one to each of her children, and paid her taxes upon that basis. The Commissioner of Internal Revenue, in auditing the return, determined that the taxpayer was entitled to but one $5,000 exclusion and asserted a deficiency. The Board of Tax Appeals sustained the Commissioner's determination and in its opinion, *Katherine S. Rheinstrom* v. *Commissioner*, 37 B. T. A. 308, 312, said:

> In this case there was a gift of one corpus to one trust by virtue of one trust instrument. Although there were four beneficiaries, there was but one transfer made by the petitioner, which was to the trust itself. We must, therefore, conclude on the authority of previous decisions that but one gift was made, and only $5,000 may be excluded.

The court, insofar as here material, stated the issue as follows:

> 1. Did the transfer in trust constitute one gift to the trust or four gifts to the beneficiaries?
> 2. If it constituted four gifts, were three of them gifts of "future interests?"

After a thorough consideration and discussion of the cases cited by both the plaintiff and the defendant, the court said, p. 647:

> It is our conclusion that the taxpayer, in creating this trust, made four gifts—one to each of her children—and that she made no gift or gifts to the trust or to the trustees.
> 2. The Commissioner contends, however, that, even if this is so, it would make no difference in the taxpayer's gift tax liability, since only her son Stewart received an unconditional present vested interest in his

> share of the income of the trust estate, and the interests of the other three children are to be regarded as "future interests." The Commissioner directs attention to the fact that by the terms of the trust instrument the trustees are not required to pay to these three children their proportion of the income, but may accumulate it for their benefit, or, in the case of two of them, may pay it to them, their wives or children. It is true that the three children, other than Stewart, received no unconditional right to have their shares of the income paid to them by the trustees. It is equally true, however, that the taxpayer retained no interest in the shares of income which were assigned to them, and that, by the terms of the trust, each of them (or the wives and children of the two sons) were to have his or her share or it was to be accumulated for his or her benefit. The enjoyment of the benefits conferred upon three of her children by the taxpayer was conditional, but it was to commence at once and not at some future date and was for their sole and immediate benefit.
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> The Commissioner cites no case which sustains his position that the interests donated by the taxpayer to, or for the benefit of, three of her children, were future interests, and we think that they were not.
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>
> The decision of the Board is affirmed insofar as it holds that the taxpayer retained a life interest in only 40 percent of the income from the trust estate. It is reversed insofar as it holds that the taxpayer was entitled to one exclusion for one gift, instead of four exclusions for four gifts. The case is remanded to the Board for a redetermination of the deficiency in accordance with this opinion.

In *Commissioner* v. *Wells*, 88 Fed. (2d) 339, it was held that the beneficiary of a trust which provided for the accumulation of income until he became of age, when he was to receive the income until he was 30, or until the death of his mother, when he was to receive the corpus, was not a gift of future interest, mainly upon the ground that it was the interest transferred by the taxpayer, and not that received by the beneficiary, which determined whether the gift was of a present or a future interest.

In *Commissioner* v. *Krebs*, 90 Fed. (2d) 880, the court dealt with trusts which directed the trustees to use the income from the trust estate for the support, maintenance, benefit, and education of named beneficiaries until they were 25 years of age, the unexpended income to be then paid to them or their issue, appointees, or distributees. It was held that the gifts, whether regarded as being to the trust or to the beneficiaries, were not gifts of "future interests."

In *Noyes* v. *Hassett*, 20 Fed. Supp. 31, the District Court of Massachusetts ruled that under a trust which permitted the trustees to accumulate income for the beneficiaries and to pay it to them or their guardians, or for the use or benefit of the beneficiaries, with discretion in the trustees to determine what expenditures were for the use or benefit of the beneficiaries, the gifts were not of future interests.

Thus it appears from the decided cases that the courts have rejected the contentions made by the defendant in this case. It is therefore held:

(1) That the gifts set up by plaintiff in the two trusts involved were of present interests in the property transferred, and

(2) That each beneficiary named in the respective trust instruments is a donee within the provisions of section 504 (b) of the gift-taxing statute of 1932, for each of whom plaintiff is entitled to an exclusion of $5,000 in the computation of the net amount of gifts subject to the tax in each of the years involved.

Plaintiff is entitled to recover. The entry of judgment, however, will be suspended pending the filing of a stipulation by the parties showing the exact amount of the judgment to be awarded plaintiff, computed in accordance with the opinion of the court. It is so ordered.

WHITAKER, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

LITTLETON, *Judge*, took no part in the decision of this case.

FIRST NATIONAL STEAMSHIP COMPANY, SECOND NATIONAL STEAMSHIP COMPANY, THIRD NATIONAL STEAMSHIP COMPANY, ALL CORPORATIONS ORGANIZED UNDER THE LAWS OF THE STATE OF NEW JERSEY, AND H. O. SCHUNDLER, INDIVIDUALLY, AND AS SOLE STOCKHOLDER OF FIRST NATIONAL STEAMSHIP COMPANY, SECOND NATIONAL STEAMSHIP COMPANY, AND THIRD NATIONAL STEAMSHIP COMPANY, AND AS SOLE DIRECTOR AND EXECUTIVE COMMITTEE OF ONE, AND AS TRUSTEE FOR THE BENEFIT OF SUCH CORPORATIONS, AND AS AGENT THEREFOR, v. THE UNITED STATES

[No. 44103. Decided March 4, 1940]

On Plea to the Jurisdiction

Jurisdiction; suit against Fleet Corporation; agency of the Government.—Where plaintiffs have pending in the District Court a suit against the United States Shipping Board Fleet Corporation, and the petition in the District Court does not allege that the cause of action arose against a person acting or professing to act under the authority of the United States, and it does not appear that such defendant could act only under the authority of the United States, it is held that the Court of Claims has jurisdiction in the instant case, under Section 154 of the Judicial Code.

Same.—In the case pending in the Court of Claims there can be no recovery unless agency of the United States on the part of the Fleet Corporation is established while in the case pending in the District Court if such agency is established plaintiffs' action must fail.

Same.—That the Fleet Corporation can be sued in its corporate capacity alone has been held, or indicated, by the Courts in many cases.

Mr. Stanley Suydam for the plaintiffs.

Mr. Lucian Y. Ray, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. J. Frank Staley* was on the brief.

The facts sufficiently appear from the opinion of the court.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiffs bring this action against the defendant to recover money alleged to have been deposited with the United States Shipping Board or the Fleet Corporation for the purpose of managing, operating, and affreighting certain vessels belonging to the United States under an agreement with the United States Shipping Board and the Fleet Corporation. The defendant specially pleads that the court is without jurisdiction to permit the filing or presentation of the claims contained in the petition for the reason that each and every claim set out therein is one in respect to which the petitioners, at the time of filing the petition, had pending and still have pending in the United States District Court for the District of Columbia in a suit against the United States Shipping Board, the United States Shipping Board Merchant Fleet Corporation, and other parties, which at the time when the cause of action alleged in said suit arose were in respect thereto acting and professing to act mediately and immediately under the authority of the United States. The defendant therefore asks that the petition be dismissed.

The defendant's plea to the jurisdiction is based upon Section 154 of the Judicial Code (28 U. S. C. A., sec. 260, p. 71) which reads as follows:

> No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

In support of its plea the defendant presents a copy of the petition filed by plaintiffs in the District Court for the District of Columbia. Since the filing of this petition it appears that the District Court for the District of Columbia sustained a motion to dismiss the case there pending against all defendants except the Fleet Corporation. From the refusal to dismiss as to the Fleet Corporation, the defendant took a special appeal which has not yet been decided.

The argument of the defendant in support of its plea rests largely upon a showing that the petitions in the two cases are substantially identical. Both petitions allege that the United States Shipping Board was an agency of the United States, that the United States Shipping Board Merchant Fleet Corporation is a corporation organized under and existing by virtue of the laws of the District of Columbia, formerly known as the United States Shipping Board Emergency Fleet Corporation, and it is urged by defendant that both the United States Shipping Board and the Fleet Corporation were agents of the United States and, being such, were acting under the authority of the United States.

An examination of the petitions shows that different defendants are sued in the respective cases and, as we think, upon different grounds. In the case pending in this court, although there is no allegation that the Fleet Corporation was acting as agent for the United States, it is obvious that there can be no recovery against the defendant unless such agency is established by the evidence. In the case pending in the District Court, if it should appear that the Fleet Corporation was acting merely as agent for the Government, plaintiffs' action must fail. Their suit is against the Fleet Corporation in its corporate capacity alone, not against it as an agent. That the Fleet Corporation could be sued in this capacity in its own behalf has been held or indicated by the courts in so many cases that we do not deem it necessary to cite them. It may be that if and when the case in the District Court is tried the evidence will show that the Emergency Fleet Corporation was in fact acting as an agent of the United States and necessarily professing to act under its authority, but the question now before the court must be determined upon the pleadings and not upon what the evidence may show. The petition does not allege that the cause of action arose against a person acting or professing to act under the authority of the United States, nor does it appear that such person could act only under the authority of the United States. The suit being for over $10,000, the ruling of the District Court in refusing to dismiss the case against the Fleet Corporation would seem to be in line with what we have said above. As the record now stands, the cause of

action in the District Court is not one that arose against a person who was at the time acting or professing to act under the authority of the United States, and the plea to the jurisdiction must be overruled. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

THE TELESCOPE FOLDING FURNITURE CO., INC., v. THE UNITED STATES

[No. 44337. Decided March 4, 1940]

On the Proofs

Processing tax on component part of an article not taxed.—Where contractor, in submitting a bid for furnishing canvas cots for the Army, followed instructions of defendant's contracting officer and did not include in its bid the processing taxes levied with respect to those component parts of the cots which had been processed from cotton but later made claim for the increased costs incurred by reason of the processing tax paid on such component parts, it is held that plaintiff is entitled to recover for such increased costs under the provisions of the Agricultural Adjustment Act of May 12, 1933.

Same.—Payment of the processing tax on a part of an article was a payment of the tax on the article itself.

Same.—Where the contractor did not pay the processing tax to the defendant itself but did pay the tax to him who, directly or indirectly, had paid the tax to the defendant, such payment comes within the "Federal Taxes" provision of the invitation for bids in response to which the contractor submitted its bid in the instant case.

The Reporter's statement of the case:

Mr. Malcolm Johnson for the plaintiff. *Ewing Everett*, *O. H. Chmillon* and *Miller & Chevalier* were on the briefs.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, upon a stipulation of facts entered into between the parties:

1. Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business at Granville, New York.

2. On July 13, 1933, The United States, through the War Department, Philadelphia, Quartermaster Depot, by invitation No. 669–34–5, solicited bids for the furnishing of 50,735 folding canvas cots, subject to a quantity increase or decrease of 25 per cent. Said invitation for bids contained, under a heading entitled Federal Taxes, the following clause:

> Prices bid herein include any Federal Tax heretofore imposed by the Congress which is applicable to the material on this bid. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date set for the opening of this bid and made applicable directly upon the production, manufacture or sale of the supplies covered by this bid, and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items. A like provision will be included in the contract.

Pursuant to proclamation of the Secretary of Agriculture processing and floor stocks taxes in respect to cotton were to become effective on August 1, 1933, under the Agricultural Adjustment Act (48 Stat. 31), approved May 12, 1933. The bids were to be opened July 28, 1933.

3. By letter dated July 20, 1933, plaintiff wrote to the contracting officer, in part, as follows:

> We would appreciate you advising us who to communicate with as to just how to figure our prices in bidding—whether to include the processing tax or not. We realize that the bid opens on the 28th of July and the cotton processing tax becomes effective August 1st.

In reply the contracting officer by letter dated July 25, 1933, called plaintiff's attention to a notice to bidders dated

July 25, 1933, a copy of which notice is attached to plaintiff's petition as Exhibit "A" and is made a part hereof by reference.

4. On July 28, 1933, plaintiff duly submitted its bid to furnish to defendant 50,735 folding canvas cots, 25 per cent more or less, at $2.39 each. Plaintiff calculated and determined its bid price exclusive of any Federal floor stocks or processing taxes imposed by the Agricultural Adjustment Act.

5. Plaintiff's bid was accepted, and on August 4, 1933, plaintiff and defendant entered into a formal contract, No. W–669–qm–4829, by the terms of which plaintiff agreed to sell and deliver to defendant, and defendant agreed to buy, 50,735 folding canvas cots, subject to a quantity increase or decrease of 25 per cent, at $2.39 each. Said contract provided, among other things, as follows:

> Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture or sale of the supplies covered by this contract, and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items.

6. In accordance with the right reserved in said contract the defendant increased the quantity of cots contracted for from 50,735 cots to 64,838 cots. Plaintiff has duly performed and executed all the terms and conditions of said contract; 64,838 cots have been delivered to and approved and accepted by the defendant, and there has been paid to plaintiff $2.39 for each cot, or $154,962.82.

7. Plaintiff manufactured the cots involved in the aforesaid contract, and in the manufacture thereof it used, among other things,

(a) approximately 30,000 yards of cotton duck which it purchased from A. D. Juilliard & Co., selling agent for Aragon Mills of Aragon, Georgia, a first domestic processor of cotton, by order dated September 13, 1933, at a price of 35¼ cents per yard, which price included the processing tax on the cotton processed in the manufacture of such cotton duck;

(b) approximately 45,000 yards of army duck which it purchased from William L. Barrell Company, Inc., selling agent for Lincoln Mills of Huntsville, Alabama, a first domestic processor of cotton, by order dated August 7, 1933, at a price of 38¾ cents per yard, which price included the processing tax on the cotton processed in the manufacture of such army duck;

(c) approximately 40,000 yards of special army duck which it purchased from Mount Vernon-Woodberry Mills, Inc., of Baltimore, Maryland, a first domestic processor of cotton, by order dated August 9, 1933, at a price of 33 cents per yard "Plus processing tax of .0517 per yd.";

(d) approximately 129,676 straps which it purchased from American Cord & Webbing Co., by orders dated August 11 and September 20, 1933, which company purchased the unbleached webbing from which it manufactured said straps from The Southern Weaving Company, and which last named company processed the cotton used by it in the manufacture of said unbleached webbing. The amount of the processing tax on account of the cotton processed by The Southern Weaving Company in its manufacture of the unbleached webbing aforesaid was included by said company in the price charged by it to said American Cord & Webbing Co., which company in turn included such amount in the price charged by it to plaintiff for 129,676 straps.

Said first domestic processors of cotton, Aragon Mills, Lincoln Mills, Mount Vernon-Woodberry Mills, Inc., and The Southern Weaving Company, paid processing and floor stocks taxes to the Collector of Internal Revenue in their respective districts as provided by the Agricultural Adjustment Act and the proclamations and regulations of

the Secretary of Agriculture issued thereunder on cotton processed by them. The amounts so paid included the processing and floor stocks taxes on the cotton used by them in the manufacture of the duck and unbleached webbing, the total amounts applicable to the materials purchased by plaintiff as above set forth being $6,006.67, which amount plaintiff paid to its said respective vendors during the months of September, October, and November, 1933.

8. Plaintiff duly made claim and demand against The United States, with the War Department, that the contract price for the above-mentioned cots be increased by the amount of $6,006.67, being the processing and floor stocks taxes applicable to the processing of the cotton used in manufacturing and processing the supplies purchased by plaintiff, as above mentioned, necessary to the manufacture by it of said cots. The claim was referred, subsequently, to the Comptroller General of the United States and was denied and rejected by him on January 31 and March 7, 1934, and on August 19, 1935.

9. Plaintiff has tendered and delivered to the defendant for delivery to the Commissioner of Internal Revenue a waiver duly signed by Aragon Mills, Aragon, Georgia, a first domestic processor of cotton, hereinbefore mentioned, of any and all claims against the United States on account of floor stocks and processing taxes paid by said Aragon Mills under the Agricultural Adjustment Act, as amended, to the extent of $1,619.57; a waiver duly signed by Lincoln Mills of Alabama, a first domestic processor of cotton, hereinbefore mentioned, of any and all claims against the United States on account of floor stocks and processing taxes paid by said Lincoln Mills under the Agricultural Adjustment Act, as amended, to the extent of $2,370.87. Said waivers have been deposited with defendant to be held in escrow pending the final determination of this case and to be filed with the Commissioner of Internal Revenue in the event judgment is rendered herein in favor of the plaintiff, otherwise to be null and void.

10. Plaintiff is the sole owner of the claim sued upon and has never transferred or assigned the same or any part

thereof or any interest therein, and no action has been had on said claim in Congress or any of the Departments of the Government other than as herein stated.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff entered into a contract with the defendant to furnish a certain number of folding canvas cots "with unbleached (gray) duck" at $2.39 each. Article 1 of the contract contained this provision:

> Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract, and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items.

The invitation for bids contained practically the same provision.

The invitation for bids was dated July 13, 1933. The Agricultural Adjustment Act was passed on May 12, 1933, (48 Stat. 31) and under the proclamation of the Secretary of Agriculture the processing tax on articles processed from cotton became effective on August 1, 1933.

The plaintiff was uncertain whether or not to include in its bid the processing taxes levied with respect to those component parts of the cots which had been processed from cotton, and accordingly it wrote the defendant's contracting officer, in part, as follows:

> We would appreciate you advising us who to communicate with as to just how to figure our prices in bidding—whether to include the processing tax or not. We realize that the bid opens on the 28th of July and the cotton processing tax becomes effective August 1st.

The contracting officer on July 25, 1933, in reply, called plaintiff's attention to his notice to bidders of the same date. This notice to bidders reads as follows:

> 1. Referring to the paragraph under the caption "Federal Taxes," appearing in each of the above mentioned invitations to Bid, and with particular reference to the item of "processing tax" therein, such a tax having been imposed by Title 1, Section 9 (a) of the Act approved May 12, 1933 (Public, No. 10, 73rd Congress), bidders are advised:
>
> (a) If a Federal processing tax is in *effect* at the time bids are opened, it will be presumed that the successful bidder included the tax in his bid and no amount in excess of that bid will be paid by the Government.
>
> (b) If a Federal processing tax becomes *effective* after bids are opened or after the contract is made, which tax must be paid by the vendor, the bid price may be increased accordingly in the manner stated in the "Federal Taxes" paragraph in the Invitations to Bid, first above referred to.
>
> 2. In conformity with the foregoing, and in order that bid prices may be correctly and justly judged, bidders under Invitation to Bid No. 669–34–5 for such of the items therein to which the Federal Processing Tax will apply, are advised to quote exclusive of such tax. Where bids have already been mailed and it is deemed necessary to change quotations, such changes should be submitted by telegraph to reach this office *before* the hour set for opening bids under this Invitation.

Relying thereon the bid submitted by the plaintiff did not include any amount on account of processing taxes levied with respect to the processing of the cotton from which were made the canvas and straps used in assembling the cots.

The defendant makes no point of the fact that the contract was executed after the processing taxes on cotton had become effective, in view of the terms of the notice to bidders issued by the contracting officer. It, however, defends upon the ground that no processing tax was levied on cots, and that the so-called "Federal Taxes" provision of the contract applies only to the articles furnished thereunder and not to the component parts thereof.

Whether or not the defendant may be technically correct in this position, it is manifest that the plaintiff and the defendant's representative understood that there was not to be included in its bid any amount on account of processing taxes on any of the material used in making the cots, but that such taxes would be added to the contract price under the "Federal Taxes" clause of the contract. When the plaintiff asked for instructions as to whether or not to include the processing tax in its bid, it, of course, knew that no processing tax was levied on the cots which it was to furnish, but it did know that such a tax was levied with respect to the canvas and straps to be used in constructing the cots. When, therefore, it inquired whether or not to include in its bid processing taxes it, of course, was inquiring about the processing tax with respect to the canvas and the straps. Likewise, when the contracting officer in reply sent plaintiff a copy of his notice to bidders dealing with processing taxes, he had reference to the processing taxes on the canvas and straps, because these were the only parts of the cots to which the processing tax applied. This notice to bidders specifically referred to plaintiff's proposed bid, and not only instructed bidders thereon to exclude processing taxes which became effective after the bids were opened, but also instructed them that if they had included such taxes in the bids already submitted to revise them so as to exclude them.

Plaintiff followed these instructions and did not include the processing tax, which it later paid to the processor, who, in turn, paid it to the defendant. Except for these instructions, the processing tax would have been included in plaintiff's bid and would have been paid by the defendant as part of the contract price.

In equity and good conscience, therefore, the plaintiff should recover the amount of the processing taxes paid by it, and the contract must be so construed by us, unless to do so would do violence to its plain and unequivocal meaning. We think it is susceptible of this construction.

The first sentence of the "Federal Taxes" provision states that the prices set forth in the contract include any Federal taxes "applicable to the material purchased" thereunder,

which had been imposed by the Congress prior to the opening of the bids. The next sentence provides that if certain taxes are thereafter levied by Congress and made applicable to "the production, manufacture or sale *of the supplies* covered by this contract, and are paid by the contractor *on the articles or supplies herein contracted for*," such taxes are to be paid the contractor by the defendant. [Italics supplied.] While strictly speaking the "material purchased" and the "articles or supplies" were the cots, they include the cot's framework, the canvas covering and straps, and all its component parts.

If the plaintiff had contracted to furnish unassembled the framework for the cots and the canvas coverings and the straps, there could be no doubt that it would be entitled to recover for the processing tax paid on the covering and straps. The fact that it tacked the canvas covering and the straps to the framework and furnished the cot as an assembled article, we think makes no difference.

The contractor did not pay the tax on the cots, but it did pay it on a part of the cots, namely, the canvas and straps. The payment of the tax on a part of the article was a payment of the tax on the article itself.

The contractor did not pay the tax to the defendant itself, but it did pay it to him who, directly or indirectly, had paid it to the defendant. Such a payment comes within the "Federal Taxes" provision. *Batavia Mills, Inc.*, v. *United States*, 85 Ct. Cls. 447. By that provision the defendant intended to reimburse the contractor for its increased costs on account of taxes which were levied by it after the contract was made, and which, therefore, the contractor had not taken into consideration in submitting its bid. Whether the contractor paid the taxes directly or indirectly, its costs were nevertheless increased, and it was this increased cost, brought about by the defendant's act, which the parties intended to take care of.

Neither *Lash's Products Co.* v. *United States*, 278 U. S. 175, nor *United States* v. *Glenn L. Martin Company*, 308 U. S. 62, is here in point. The *Lash's Products Company* case did not involve the proper construction of a contract, which is the question here. Nor was the question here

present in the *Martin* case. That case involved only the question of whether Social Security taxes came within the "Federal Taxes" provision.

It results that the plaintiff is entitled to recover of the defendant the sum of $6,006.67. It is so ordered.

WILLIAMS, *Judge*; LITTLETON, *Judge*; GREEN, *Judge*; and WHALEY, *Chief Justice*, concur.

BERTHA M. BAILEY AND W. C. BAILEY, JR., EXRS. OF THE ESTATE OF WALTER C. BAILEY, DECEASED, v. THE UNITED STATES

[No. 43505. Decided March 4, 1940]

On Defendant's Motion for New Trial

Estate tax; life insurance policy proceeds.—Decided upon the authority of *Helvering et al.* v. *Hallock et al.*, 309 U. S. 106.

Mr. Morris H. Goldman for the plaintiffs. *Mr. Fred W. Weitzel* was on the brief.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

The facts sufficiently appear from the statement of the case, 89 C. Cls., 364, and from the opinion of the court, which was delivered by Littleton, *Judge*, as follows:

The defendant's motion for a new trial and for judgment dismissing the petition is based on the opinion of the Supreme Court in *Helvering et al.* v. *Hallock et al.*, 309 U. S. 106.

All of the insurance policies involved in this case were taken out by Walter C. Bailey on his own life subsequent to the enactment of section 302 (g) of the Revenue Act of 1924 (43 Stat. 253, 305) (finding 6, entered May 29, 1939), and were assigned July 12, 1932, so as to make his wife, Bertha M. Bailey, and son, W. C. Bailey, life owners of the

policies and the survivor unconditionally entitled to the proceeds thereof upon the death of the insured provided they survived him. The assignment further provided that if the insured should survive these beneficiaries he would then become the "life owner," as before the assignment, and that the proceeds of the policies would be payable to his "executors, administrators, or assigns" (Finding 7).

In the first opinion of May 29, 1939, 89 C. Cls. 364, we laid aside as having no bearing on the question of taxability, in view of *Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39, *Becker* v. *St. Louis Trust Co.*, 296 U. S. 48, and *Industrial Trust Co. et al.* v. *United States*, 296 U. S. 220, the fact that under this transfer *inter vivos* the right of the assignees to the proceeds of these policies in excess of the exemption, which is the only property with which we are here concerned, was wholly conditional upon such assignees surviving the assignor (insured). We held, however, that since the record required the finding that the insured had continued to pay the premiums after assignment Congress had authority to tax the proceeds, i. e., to require their inclusion in the gross estate for the purpose of determining the net estate to be used as the measure of the estate tax, and that it had done so by the language of section 302 (g), Revenue Act of 1924, and corresponding sections in subsequent acts. We therefore dismissed the petition.

Subsequently, upon a motion for a new trial and for permission to introduce further evidence, we held, upon evidence showing that the assignee, Bertha M. Bailey, had paid all the premiums subsequent to assignment, that, in such case, under the rule of *Helvering* v. *St. Louis Trust Co.*, *supra*, the proceeds were not taxable. The decision dismissing the petition was therefore vacated (opinion December 4, 1939) 89 C. Cls. 376, and judgment entered for refund of the tax paid.

In *Industrial Trust Co. et al.* v. *United States*, 80 C. Cls. 647, 9 Fed. Supp. 817, we thought that under the rule announced in *Klein* v. *United States*, 283 U. S. 231, the retroactive provision of section 302 (h), Revenue Act of 1924, authorized the inclusion in the gross estate of insurance proceeds of policies taken out prior to 1916 where such pro-

ceeds were payable to the estate or assignees of the insured if he survived the beneficiary, who was also designated prior to 1916, when the insured did not die until May 30, 1930. The Supreme Court held (296 U. S. 220), first, that since the policies were taken out and became fully paid-up policies prior to the enactment of the first statute imposing an estate tax, the rule announced and applied in *Llewellyn* v. *Frick*, 286 U. S. 238, was controlling, and that the retroactive provision in a subsequent statute did not help the government's contention; and, second, that under the decisions in *Helvering* v. *St. Louis Trust Co.*, *supra*, and *Becker* v. *St. Louis Trust Co.*, *supra*, a provision in a policy that if the insured survived the named beneficiary the proceeds should be paid to his estate or his assignees would not authorize the taxation of such proceeds where the insured did not reserve the right to alter the provision naming such beneficiary and to designate another.

Plaintiffs here contend "that the Hallock decisions have no application to the facts of this case and the principles there involved are not here present." With this we cannot agree. Nor do we now consider, in view of the *Hallock* case, as of any controlling importance the fact that the designated beneficiary (assignee), rather than the insured, paid all premiums subsequent to 1932 when the insured surrendered the right to change the beneficiaries designated as "life owners" unless he survived them. The rule of the *Hallock* case is not conditioned upon who bears the expense of maintaining or carrying the property or property rights transferred until the transferor's death or until it reverts to him. In most cases of such transfers *inter vivos* the beneficiary or a trustee for such beneficiary bears such expense. Otherwise the income is taxable to the donor. *Burnett* v. *Wells*, 289 U. S. 670.

In view of the facts in the case at bar we think the proceeds of the policies taken out by the insured and conditionally assigned in 1932 are taxable under the decision in *Helvering* v. *Hallock et al.*, *supra*, in which the decisions in the *St. Louis Trust Co.* cases were modified. For the reasons

stated by the court in the *Hallock* case, and by this court in *Industrial Trust Co.* v. *United States*, *supra*, as applied to facts such as obtain here, the defendant's motion for a new trial is allowed and the petition is dismissed. It is so ordered.

WHITAKER, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

ALUMINUM COMPANY OF AMERICA, A CORPORATION, v. THE UNITED STATES

[No. 42643. Decided January 8, 1940; plaintiff's motion for new trial allowed, April 2, 1940; findings and opinion amended and new judgment entered, May 6, 1940]

On the Proofs

Income tax; judgment on counterclaim.—Where the parties to the instant suit entered into a stipulation that decision in another case with respect to a counterclaim would be binding upon that issue in two other pending suits, including this one, and judgment has been rendered in the other suit, in which the counterclaim was allowed in part and disallowed in part, but in which the amount allowed was less than the amount claimed by plaintiff in that suit, it is held that the entire withholding by the Comptroller General in this case was erroneous and that plaintiff is entitled to judgment for that amount.

Same; interest on overpayment withheld.—Where part of overpayment of income and profits tax was wrongfully withheld, it is held that interest thereon should be computed from date tax was paid to a date preceding issuance of refund check by not more than thirty days.

Same; application of overpayments to deficiencies.—Where, in making the final computations, after the deficiencies and overpayments for all years had been finally determined, the Commissioner applied the overpayments against the deficiencies and considered the earliest deficiencies satisfied by the earliest overpayments, it is held that such action was proper.

Same; informal claim.—An informal claim filed November 10, 1921, requires the computation of interest thereon from six months thereafter, under section 1324 (a) of the Revenue Act of 1921.

The Reporter's statement of the case:

Mr. Ward Loveless, for the plaintiff. *Miller & Chevalier* and *Smith, Buchanan, Scott & Ingersoll* were on the briefs.

Mr. John W. Hussey, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the briefs.

The court made special findings of fact as follows:

1. Plaintiff is now, and at all times hereinafter mentioned has been, a Pennsylvania corporation with its principal office in Pittsburgh.

2. On or about April 1, 1918, plaintiff filed a return of its income for income tax purposes, and on behalf of itself and affiliated corporations filed a consolidated return for excess profits tax purposes for 1917. On the taxable income reported in such returns income and excess profits taxes in the total amount of $6,153,724.66 were reported, and these taxes were assessed against plaintiff in April 1918. The amount so assessed was paid by plaintiff June 15, 1918.

Thereafter the Commissioner of Internal Revenue (hereinafter referred to as the Commissioner) determined a deficiency in income and excess profits taxes against plaintiff for 1917 in the amount of $498,514.42, which he assessed against plaintiff on his March 1923 list. The Commissioner collected that amount from plaintiff by crediting on June 11, 1923, against the additional assessment $245,751.37, a part of an overpayment of income and excess profits taxes for 1919 theretofore determined by him in favor of plaintiff, and by crediting on April 15, 1924, against the additional assessment $252,763.05, a part of an overpayment of income and excess profits taxes for 1918 theretofore determined by him in favor of plaintiff.

3. On or about March 15, 1919, plaintiff filed a tentative return for the calendar year 1918 and accompanied such return by the payment of taxes in the sum of $2,267,315.16. On or about June 16, 1919, plaintiff, on behalf of itself and affiliated corporations, filed a completed consolidated return for the calendar year 1918 showing a total tax liability of

$3,315,731.50. The difference between the total amount of taxes shown on that return and the amount paid March 15, 1919, was paid as follows: June 16, 1919, $219,483.46, and December 15, 1919, $828,932.88.

4. March 15, 1920, plaintiff, on behalf of itself and affiliated corporations, filed a consolidated return for the calendar year 1919. On the taxable income reported in that return income and excess profits taxes in the total amount of $2,010,969.21 were reported to be due, and these taxes were duly assessed against plaintiff. The amount so assessed was duly paid by plaintiff in equal quarterly installments during 1920.

In the foregoing consolidated return plaintiff deducted $797,170.10 as an allowance for amortization of the cost of facilities erected, installed, or acquired by it or corporations affiliated with it on or after April 6, 1917, for the production or transportation of articles contributing to the prosecution of the war with the German Government. The amount of $797,170.10 was the portion of the total allowance of $6,807,601.05 claimed as amortization for the years 1918 and 1919 of the cost of war facilities which was apportioned, in the consolidated return filed by plaintiff for itself and affiliated corporations for the taxable year 1918, to that part of the amortization period which fell within 1919. The amount of $6,807,601.05 constituted the maximum preliminary estimate by plaintiff of the amount of such amortization which, under the regulations promulgated by the Commissioner and approved by the Secretary of the Treasury, might be deducted for the purposes of a return made in the year 1919, namely 25 percent of the cost of such facilities.

5. March 15, 1921, and December 15, 1921, plaintiff filed claims for credit of income and excess profits taxes overpaid for the years 1917, 1918, and 1919, in the respective net amounts of $246,420.33 and $200,491.76, against the installments of original taxes due for 1920 on those dates. The grounds of the claim filed March 15, 1921, were substantially as follows: In preparing the data necessary for the elimination of intercompany profits in the consolidated return of plaintiff for 1920, errors had been discovered in the computation of intercompany profit in inventories affecting the

income of prior years. As a result thereof it was alleged that income was reported in excess of the correct amount and taxes paid in excess for the years 1917 and 1918, and that income was reported less than the correct amount and taxes underpaid for the year 1919. The net result for the three years (1917, 1918, and 1919) was an alleged overpayment of $246,420.33. The grounds of the claim filed December 15, 1921, were substantially the same as the claim filed March 15, 1921, except that the later claim made further correction of certain alleged errors which were not included in the earlier claim. No reference was made in either claim to any amortization items.

December 15, 1921, plaintiff also filed a claim for refund of $31,750.05 for 1917, 1918, and 1919, the amount of the claim representing plaintiff's computation of the net amount of excess taxes paid to that date after deducting the amounts set out in the claims for credit heretofore referred to. The grounds of the claim for refund were substantially identical with those set forth in the claims for credit.

6. November 10, 1921, plaintiff's representatives filed with the Commissioner two volumes entitled "Schedule of Amortized Property—Aluminum Company of America, Pittsburgh, Pa." In these volumes a revised amortization cost was set up of $37,026,306.11 and a revised amortization deduction of $18,124,339.28, instead of $6,852,697.36 (being the sum of $6,807,601.05 mentioned in finding 4 and $45,096.31 deducted as amortization of the excess of the cost of property useful only as war facilities, which had been permanently discarded, over the scrap or salvage value thereof) originally claimed for 1918 and 1919. November 15, 1921, plaintiff wrote the Commissioner as follows:

> We submit for your consideration revised claim for amortization of war facilities, affecting income and excess profits tax returns for the taxable years 1918 and 1919. This claim covers the properties of this company and its affiliated companies included in the consolidated return. The claim consists of two volumes, delivered to you on November 10th by representatives of the Engineering Service Corporation, who have been retained by us to prepare an independent appraisal of the properties involved. The claim, based upon their findings, shows a total construction expenditure of $37,-

026,306.11, upon which amortization is calculated in the amount of $18,124,339.28; which figures are repeated herein for the purpose of identifying the volumes above referred to as delivered to you on the 10th.

That communication was delivered to the Commissioner's representative in Pittsburgh, Pa., on the same day and it was stamped received in the Bureau of Internal Revenue at Washington, D. C., November 21, 1921.

However, on November 15, 1921, but prior to the receipt of the foregoing communication from plaintiff, the Commissioner advised plaintiff that the volumes referred to above had been filed in his office November 10, 1921, and that the case had already been assigned for field investigation by an appraisal engineer of the Amortization Section.

7. On consideration of the claims made in the two volumes referred to in the previous finding, the Commissioner on February 16, 1922, May 22, 1922, and June 16, 1922, furnished to plaintiff copies of the findings of the Amortization Section with respect thereto. Plaintiff incorporated these findings in a claim for refund of income and excess profits taxes based on such findings for the years 1918 and 1919, using Treasury Department form 843, which it filed January 26, 1923. February 12, 1923, the Commissioner addressed to plaintiff a registered letter which was duly received in which he stated the results of an examination of plaintiff's income and profits tax returns, and those of corporations affiliated with it, for 1917, 1918, and 1919. The letter showed overpayments by plaintiff of income and profits taxes for 1918 and 1919 in the respective amounts of $808,614.42 and $692,663.46. In the schedules attached to the letter the Commissioner made the adjustments of income for the years 1918 and 1919 called for by the aforementioned findings of the Amortization Section and made other adjustments on the grounds set out by plaintiff in its claim for credit filed March 15, 1921, without which latter adjustments the amount of the overpayment determined by the Commissioner would have been less for 1918 by $256,226.98. The remainder of the overpayment for 1918 of $808,614.42, that is, $552,387.44, and the entire overpayment of $692,663.46 for 1919 were due to the allowance by the Commissioner of additional deductions for amortization

in accordance with the aforementioned findings of the Amortization Section.

8. The overpayment determined by the Commissioner for 1918 in the amount of $808,614.42, as shown in finding 7, was listed on a schedule of refunds and credits signed by the Commissioner April 15, 1924, by which he credited $252,-763.05 of that overpayment against an additional assessment of income and excess-profits taxes for 1917 which had been assessed against plaintiff on the Commissioner's March 1923 list.

9. The overpayment determined by the Commissioner for 1919 in the amount of $692,663.46, as shown in finding 7, was listed on a schedule of refunds and credits signed by him June 11, 1923, by which he credited $446,912.09 thereof against an original assessment of income and excess-profits taxes due from plaintiff for 1920. The remainder of the overpayment of $692,663.46 for 1919, that is, $245,751.37, the Commissioner credited against a deficiency in income and excess-profits taxes for 1917 which had been assessed against plaintiff on the Commissioner's 1923 list.

10. On or about March 15, 1921, plaintiff, on behalf of itself and affiliated corporations, filed a consolidated return for the calendar year 1920, showing income and profits taxes due in the amount of $801,967.07, which amount was duly assessed against plaintiff. As shown in finding 5, plaintiff on March 15, 1921, and December 15, 1921, filed claims for credit in the respective amounts of $246,420.33 and $200,-491.76, representing alleged net overpayments for the years 1917, 1918, and 1919, against the original income and excess-profits taxes assessed for 1920. June 15, 1921, and September 14, 1921, plaintiff paid the respective amounts of $154,563.21 and $200,491.77 on account of original income and profits taxes assessed for 1920.

June 11, 1923, as shown in finding 9, the Commissioner credited $446,912.09 against the unpaid balance of original taxes assessed for 1920 out of an overpayment for 1919 theretofore determined by him in favor of plaintiff.

11. On or about March 15, 1924, plaintiff, on behalf of itself and affiliated corporations, filed a consolidated return for the calendar year 1923. On the taxable income reported

in such return, income taxes were reported in the amount of $665,177.18, and these taxes were duly assessed against plaintiff. March 15, 1924, June 15, 1924, September 15, 1924, and December 15, 1924, plaintiff filed claims for credit against such assessment aggregating the total amount of the tax so assessed, that is, $665,177.18. The taxes so assessed were thereafter satisfied by a credit from an overpayment of taxes for the year 1917, as hereinafter set forth in finding 14.

12. Thereafter, various protests, briefs, and claims for refund having been filed by plaintiff, the Commissioner proceeded further with an examination of plaintiff's tax liability for 1917, 1918, and 1919, the issues under consideration relating to the merits of plaintiff's tax liability for those years. The results of that consideration for those three taxable years were set out in a proposed thirty-day letter which was transmitted on or about April 24, 1925, to the office of the General Counsel for the Bureau of Internal Revenue and which disclosed overassessments for 1917 and 1918 and a deficiency for 1919. The proposed letter was never sent to plaintiff.

While the case was pending before the office of the General Counsel numerous conferences were held between representatives of plaintiff and the General Counsel, wherein proposed adjustments to taxable income and invested capital were discussed and briefs and additional data were submitted by plaintiff's representatives. Pursuant to these negotiations a computation of taxes was prepared by the Bureau of Internal Revenue which disclosed overassessments for 1917 as follows:

	Overassessment
Aluminum Company of America, Parent	$1,285,715.88
Aluminum Cooking Utensil Company, Subsidiary	8.50
Aluminum Ore Company, Subsidiary	171.01
American Bauxite Company, Subsidiary	1,068.16
Electric Carbon Company, Subsidiary	13.88
St. Lawrence River Power Company, Subsidiary	449.21
	1,287,426.64

Plaintiff's representatives acquiesced in that computation for 1917, but were advised that the allowance of the overassessment would be withheld pending the completion of the

audit then being made for 1918 and 1919. The Bureau proposed to credit the 1917 overassessment against the 1918 and 1919 deficiencies, if any, when finally determined. Efforts were then made by plaintiff's representatives to separate the 1917 case and obtain an immediate refund of the overpayment resulting from the 1917 overassessment, and in a letter dated November 2, 1927, requested that the Commissioner approve a separate determination with regard to 1917.

13. February 1, 1928, the Commissioner mailed to plaintiff a thirty-day letter for the years 1920, 1921, 1922, and 1923, proposing an additional assessment for 1920 in the amount of $1,332,883.60, an overassessment for 1923 of $239,232.26, and showing no change in tax liability for 1921 and 1922. Thereafter the Bureau advised plaintiff's representatives that payment of a refund for 1917 would be withheld pending the Commissioner's final determination for 1920 unless an agreement permitting the settlement of interest on the 1917 overpayment as on a credit should be made that would cover any deficiency for the year 1920, as well as any deficiencies for the years 1918 and 1919. This matter was discussed at a conference on February 24, 1928, between representatives of the plaintiff and the General Counsel's office in connection with a preliminary draft of a proposed agreement relating to plaintiff's request for immediate payment of the principal amount of the 1917 overpayment and relating to the computation of interest thereon.

14. May 24, 1928, following several conferences relative thereto, plaintiff delivered to the Commissioner an agreement duly executed by it and affiliated corporations, which read as follows:

> The Aluminum Company of America, a corporation organized under the laws of the Commonwealth of Pennsylvania, and all corporations affiliated with it for the purpose of consolidated returns of net income and invested capital for the year 1917, hereby stipulate that upon the allowance and payment of a refund or refunds of income and excess-profits taxes imposed upon them for the said year in accordance with proposed certificates of overassessment in the aggregate amount of $1,287,426.64 they will accept the principal amount of said refunds, the interest on the overassessments to be

later adjusted upon determination of tax liability for the years 1918, 1919, and 1920, as follows:

If a deficiency in tax is determined to be due for the years 1918, 1919, or 1920, interest is to be adjusted on the overpayment for 1917 as though such overpayment, to the extent that it is equal to the aggregate amount of the deficiencies, had been applied as a credit against such deficiencies, that is to say, interest shall be allowed and paid upon the amount of the overpayment for the taxable year 1917 from the date such tax was paid to the respective due dates of the 1918, 1919, and/or 1920 deficiencies. In the event that the 1917 overassessment is found to exceed the aggregate amount of the deficiencies for 1918, 1919, and 1920, then interest shall be allowed and paid upon such excess in accordance with the provisions of law governing the payment of interest upon the allowance of a refund.

This agreement is not to prejudice the rights of the undersigned or the Commissioner in the event that it is determined by legislative action, regulation, Internal Revenue ruling or decision of a court of competent jurisdiction, not appealed from, in another case, that such interest computation herein provided is erroneous.

The fact that the original assessment of taxes for 1923 in the amount of $665,177.18 was then unpaid and outstanding due to claims for credit filed by plaintiff, as hereinbefore stated, was not in the minds of the representatives of the parties and was not taken into consideration in the conferences leading up to the agreement of May 24, 1928. After his receipt of the agreement referred to in this finding, the Commissioner, pursuant to claims for refund or credit of the amounts paid by plaintiff for 1917, determined that plaintiff had overpaid its tax for 1917 in the amount of $1,285,715.88 and on July 10, 1928, approved and signed a schedule of refunds and credits dated that day, crediting $665,177.18 of the overpayment for 1917 against the original tax assessed in that amount against the plaintiff upon the consolidated return filed by it for 1923, against which original tax plaintiff had duly filed claims for credit, as stated in finding 11, and allowing as a refund to plaintiff the remaining amount of $620,538.70 and authorizing payment thereof. On or about August 22, 1928, the Commissioner delivered to plaintiff a certificate of overassessment for 1917

showing an overassessment for that year of $1,285,715.88 and showing the credit and the refund on account of such overassessment as hereinbefore indicated in this finding.

At the same time the allowance was made with respect to the overassessment in favor of plaintiff for 1917, the Commissioner also allowed overassessments for 1917 as follows:

American Cooking Utensil Company	$8.50
Aluminum Ore Company	171.01
American Bauxite Company	1,068.16
Electric Carbon Company	13.88
St. Lawrence River Power Company	449.21

Each of the above amounts was abated, except the overassessment in favor of the St. Lawrence River Power Company of $449.21, of which $430.03 was abated and the balance of $19.18 was refunded, and the overassessment of $1,068.16 to the American Bauxite Company which was found to be an overpayment and was refunded. These latter amounts were refunded to the respective companies on or about August 17, 1928.

15. August 17, 1928, the Comptroller General of the United States certified to the Secretary of the Treasury (Division of Bookkeeping and Warrants) that he had examined and settled the claim of plaintiff for overassessment of taxes for the year 1917, as shown in a schedule of refunds and credits referred to in finding 14, and found that the sum of $620,538.70 was due from the United States to the plaintiff, and directed:

Two warrants to issue:

Aluminum Company of America, for		$306,079.77
2400 Oliver Bldg., Pittsburgh, Pa.		
Treasurer of the United States, for		314,458.93
For deposit to the credit of "Miscellaneous Receipts, War Department" (Settlement of Claim against the Aluminum Co. of America) N. P. C. This action is taken on account of claimant's indebtedness to the United States, shown as follows:		
Amount of original indebtedness		1,540,473.57
Amount previously collected	$1,226,014.64	
Amount herein collected	314,458.93	
		1,540,473.57
Balance due United States		Nothing

On or about August 22, 1928, plaintiff received from the Comptroller General a notice of settlement of claim dated August 17, 1928, and bearing the legend quoted above. The alleged indebtedness to the United States referred to in that legend is that which is the subject of a counterclaim in the cases of this plaintiff against the United States pending in this court as Nos. J–683 and L–125 and also the same counterclaim which is pleaded in this suit.

16. The amount of $306,079.77 referred to in finding 15 was refunded to plaintiff by check dated August 21, 1928, which was paid August 27, 1928. Neither the amount of $314,458.93 mentioned in finding 15 nor any part thereof has been paid to plaintiff unless the action outlined in that finding be considered as a payment of that amount.

17. February 28, 1931, the Commissioner determined an overpayment in favor of plaintiff for 1918 of $246,917.85 and allowed interest on such overpayment in the amount of $21,580.78. February 28, 1931, the Commissioner credited the overpayment for 1918 of $246,917.85 against a deficiency for 1919 of $300,515.26, as shown in finding 18. April 16, 1931, the Commissioner credited the interest of $21,580.78 against a deficiency for 1920 as shown in finding 19.

18. November 1, 1930, the Commissioner determined a deficiency to be due from plaintiff for 1919 in the amount of $300,515.26. That deficiency, together with interest thereon in the amount of $90,253.38, was duly assessed against plaintiff on or about February 28, 1931. Against this deficiency the Commissioner, on a schedule dated February 28, 1931, credited an overpayment of tax for 1918 in the amount of $246,917.85, such amount being that mentioned in finding 17. March 28, 1931, pursuant to notice and demand therefor, plaintiff paid $53,597.41, the balance of the principal sum referred to above, demand for the collection of the interest being withheld by the collector under instructions of the Commissioner. The assessment of interest was thereafter abated by the Commissioner on a schedule dated October 23, 1931.

19. December 18, 1930, the Commissioner determined a deficiency to be due from plaintiff for 1920 of $761,332.49, which, with interest thereon in the amount $234,584.26, was

duly assessed against plaintiff April 14, 1931. The Commissioner on a schedule of overassessments, abatements, credits, and refunds dated April 16, 1931, allowed credits, and on a schedule of overassessments, abatements, credits, and refunds dated October 23, 1931, allowed an abatement against the deficiency and interest for 1920, as follows:

Deficiency assessed April 14, 1931		$761,332.49
Interest February 26, 1926, to April 14, 1931		234,584.26
		995,916.75
Credits:		
Interest on 1917 overpayment	$160,444.89	
Interest on 1918 overpayment	21,580.78	
Interest on 1917 overpayment:		
American Bauxite Company	160.22	
St. Lawrence River Power Company	2.88	
	182,188.77	
Interest abated as set forth hereinafter	58,177.63	
		240,366.40
Balance due after credits and abatement		755,550.35

20. By means of the foregoing assessment, credits, and abatement of interest made and allowed by the Commissioner and entered on plaintiff's account for taxes and interest, the Commissioner adjusted the amounts of interest due plaintiff and interest due from plaintiff for the years 1917, 1918, 1919, 1920, and 1923 in accordance with his construction of the agreement filed by plaintiff May 24, 1928, and set out in finding 14. The amounts of such interest were determined and computed by the Commissioner in the manner stated in Exhibit Q attached to an Agreed Statement of Facts filed in this case and made a part hereof by reference. The amount abated, $58,177.63, represents the difference between $234,584.26, the amount of interest originally computed by the Commissioner and assessed against plaintiff on the deficiency of $761,332.49 for 1920, and $176,406.63, the amount of interest determined in Exhibit Q to be due from plaintiff. The net amount of interest so allowed to plaintiff for 1917, 1918, 1919, 1920, and 1923

as a result of the adjustments set out above and in finding 19, was as follows:

Total interest due plaintiff	$182,188.77
Total interest due from plaintiff	176,406.63
Net amount of interest allowed plaintiff	5,782.14

May 1, 1931, pursuant to notice and demand, plaintiff paid the net amount of $755,550.35, shown as the balance due in the tabulation set out in finding 19.

21. Thereafter various events occurred with respect to a recomputation of interest for the several years involved as to which certain facts were stipulated by the parties as follows:

> Inasmuch as the interest determinations and computations made by the Commissioner prior to May 1, 1931, were necessarily estimated in part and were understood both by the Commissioner and by plaintiff's representatives to be tentative, the Commissioner thereafter undertook to redetermine and recompute the amounts of interest due to and claimed from plaintiff in accordance with his construction of the agreement of May 24, 1928. The plaintiff also requested a recomputation of interest and an increased allowance thereof. Several conferences were held between representatives of the Bureau and of the plaintiff regarding this matter. At these conferences counsel for plaintiff agreed that, for the purpose of reaching without litigation a satisfactory settlement of interest due to plaintiff upon the 1917 overpayment, the provision of the agreement of May 24, 1928, set forth in paragraph 15 hereof with reference to a deficiency in tax for the years 1918, 1919, or 1920 might be treated as if it covered also the original tax due for the year 1923, and the contention of plaintiff's counsel was that in the event the said agreement were so treated the said 1917 overpayment should be treated as if it had been applied first against the 1919 deficiency of $300,515.26 and secondly against the 1920 deficiency of $761,332.49, and the balance against installments of the original assessment of tax for the year 1923.

22. On a supplemental schedule dated September 9, 1931, the Commissioner allowed plaintiff additional interest in the net amount of $27,884.52 as a result of his redeterminations

and recomputations of interest due to and from plaintiff for the years 1917, 1918, 1919, 1920, and 1923, which amount was paid to plaintiff on or about September 23, 1931. That amount of additional interest so allowed and paid to plaintiff was determined and computed by the Commissioner in accordance with detailed computations set out in paragraph 26 of an Agreed Statement of Facts filed February 21, 1936, which paragraph is incorporated herein by reference.

In that recomputation the Commissioner treated the 1917 overpayment of $1,286,803.22, for the purpose of interest computation, as if it had been applied, first, in satisfaction of the deficiency of $300,515.26 for 1919; second, in satisfaction of the deficiency of $761,332.49 for 1920, and the balance, $224,955.47, in satisfaction of the first installment of the original assessment for 1923 and a part of the second installment of the original assessment for 1923, the earliest overpayments being applied in satisfaction of the earliest due liabilities. He also treated the 1918 overpayment of $246,917.85, for the purpose of the interest computation, as if it had been applied in satisfaction of the balance of the second installment of original tax for 1923 and a part of the third installment for 1923. For the purpose of the interest computation the Commissioner also treated the sum of $621,626.04, a portion of the overpayment for 1917, which was scheduled for refund July 10, 1928, as having been erroneously scheduled for refund instead of having been withheld for application as credits against deficiencies and outstanding assessments for subsequent years. The Commissioner also treated certain interest credits as if applied in satisfaction of interest due from plaintiff and made various other adjustments, all of which are set out in detail in paragraph 26 of the Agreed Statement of Facts heretofore referred to with the result that additional interest was allowed and paid to plaintiff in the net amount of $27,884.52, as set out above.

[23. Subsequent to December 18, 1930, plaintiff herein entered suit for the recovery of a part of the deficiency of $761,332.49 for 1920 assessed against it on April 14, 1931.

On October 10, 1938, the District Court of the United States for the Western District of Pennsylvania, in the suit

of *Aluminum Company of America, a corporation*, v. *The United States*, No. 7765 Law, covering the calendar year 1920, entered judgment in favor of plaintiff therein and against the United States in the amount of $138,580.90 with interest thereon at the rate of six percent per annum from May 1, 1931, to a date not more than thirty days prior to the date of the refund check, thereby determining that the correct deficiency in income and excess-profits taxes due from the plaintiff for the calendar year 1920 was $622,751.59, instead of $761,332.49 found as such by the Commissioner of Internal Revenue on December 18, 1930, as set out in paragraph 19 hereof. The Judgment of that court has now become final.

In computing the interest due to the plaintiff and in computing the readjustment of the amount of interest heretofore paid or credited to the plaintiff by the Commissioner, both amounts shall be computed by using $622,751.59 as the correct deficiency for 1920 due from the plaintiff instead of the amount of $761,332.49 determined by the Commissioner on December 18, 1930, to be due from the plaintiff, wherever it is necessary and appropriate in such computations to make such change.]

The court decided that the plaintiff was entitled to recover.

WILLIAMS, *Judge*, on January 8, 1940, delivered the opinion of the court:

The suit arises as the result of the determination by the Commissioner of an overpayment of income and profits tax in favor of plaintiff for 1917 in the amount of $1,285,715.88 and the failure on the part of the Commissioner to make refund or credit of such amount and the interest thereon in a manner satisfactory to plaintiff. More specifically, what is asked is (1) judgment for $314,458.93 of that amount which was withheld by the Comptroller General and applied against an alleged indebtedness to the United States on account of certain transactions not connected with internal revenue taxes, and (2) a greater allowance of interest on the overpayment than that determined and allowed by the Commissioner.

Opinion of the Court

With respect to the item of $314,458.93, it will be sufficient to state that at the time the overpayment of $1,285,715.88 was scheduled on July 10, 1928, under circumstances which will hereinafter appear in connection with a discussion of the interest issue, the Government was contending that there was an indebtedness due from plaintiff on an unrelated matter, of $1,540,473.57, and that when the overpayment was scheduled the Comptroller General withheld $314,458.93 in partial satisfaction of that indebtedness. Similar action was taken by the Comptroller General with respect to certain amounts which plaintiff also later sought to recover by suits in this court (No. J-683) (87 C. Cls. 96), as well as on account of an overpayment for 1918 (No. L-125) *ante*, p. 173. In those two suits, as well as in the case at bar, defendant pleaded the alleged indebtedness of $1,540,473.57 as a counterclaim in defense of the actions brought by plaintiff, but in the submission of the cases to the court the parties entered into a stipulation that the decision in J-683 with respect to the counterclaim would be binding upon that issue in the two other cases. Judgment was rendered in J-683 on June 20, 1939 (89 C. Cls. 540, in which the counterclaim was allowed in part and disallowed in part, but in which the amount allowed was less than the amount claimed by plaintiff in that suit. It accordingly follows that the entire withholding by the Comptroller General in this case must be considered erroneous and that plaintiff is entitled to judgment for that amount. A similar situation existed in No. L-125 on account of the withholding of a part of the overpayment for 1918, and, consistent with that opinion and for reasons therein stated, plaintiff is entitled to judgment for $314,458.93, with interest to a date preceding the date of the refund check by not more than thirty days, with appropriate credit for interest allowed in the interest computation and adjustments hereinafter referred to.

The principal controversy in regard to the computation of interest on the entire overpayment of $1,285,715.88 arises by reason of circumstances connected with the scheduling of that overpayment on July 10, 1928. At and prior to that

time the Commissioner had under consideration not only plaintiff's tax liability for 1917, but also for 1918, 1919, 1920, and 1923. When an agreement was reached as to plaintiff's correct tax liability for 1917, which showed the foregoing overpayment, plaintiff asked that that overpayment be scheduled immediately without awaiting a final determination of its tax liability for other years. At that time the usual statutory provisions were in effect which required that when an overpayment had been allowed, no part thereof should be refunded until after all deficiencies then due from the same taxpayer were satisfied by credit out of the overpayment. Plaintiff, however, in order to secure the immediate allowance and payment of the overpayment for 1917 without awaiting action on other years, entered into an agreement with the Commissioner which provided for the immediate allowance and payment of the principal amount of the overpayment for 1917 with interest thereon to be adjusted and paid later after final determination had been had of its tax liability for 1918, 1919, and 1920. Apparently through oversight the year 1923 was not mentioned in the agreement, though we do not think this materially affects the situation. In any event, after the agreement was executed by plaintiff, the Commissioner approved a separate determination for 1917, and on July 10, 1928, signed a schedule of refunds and credits through which $665,177.18 of the total overpayment of $1,285,715.88 was credited against an original assessment then outstanding for 1923 and the balance was scheduled for refund. Upon examination of that schedule the Comptroller General withheld out of the amount scheduled for refund the sum of $314,458.93 for application against an alleged indebtedness due from plaintiff as heretofore shown, and shortly thereafter, August 21, 1928, the balance, $306,079.77, was paid to plaintiff.

Later final determinations were had with respect to 1918, 1919, and 1920, which showed an overpayment for 1918 of $246,917.85, a deficiency for 1919 of $300,515.26, and a deficiency for 1920 of $761,332.49. The correctness of these amounts, as well as plaintiff's tax liability for 1923, was in controversy at the time the agreement was entered into with

respect to the separate disposition of the overpayment for 1917. After these final determinations had been made for the years 1918, 1919, and 1920, the Commissioner credited the overpayment for 1918 of $246,917.85 against the deficiency for 1919 of $300,515.26, and shortly thereafter plaintiff paid the balance of the 1919 deficiency of $53,597.41, collection of interest thereon being withheld pending its adjustment in relation to other items. Soon thereafter a tentative computation of interest was made by the Commissioner for 1917, 1918, 1919, 1920, and 1923, both on account of interest due from plaintiff on deficiencies and assessments and on account of overpayments in favor of plaintiff, and the result of that computation was a net amount of interest due plaintiff of $5,782.14, which in effect was deducted from the deficiency of $761,332.49 for 1920, leaving a balance of $755,550.35, which plaintiff paid May 1, 1931. [The deficiency of $761,332.49 determined by the Commissioner for 1920 was subsequently determined by the court, as set forth in finding 23, to be $622,751.59, which decision has become final and the excess of $138,580.90 determined and assessed by the Commissioner and paid by plaintiff has been refunded or credited.]

After all of these acts had occurred which are set out in detail in our findings, the Commissioner proceeded with a determination of an interest computation as shown on a schedule dated September 9, 1931, on account of his adjustments of plaintiff's tax liability for the years 1917, 1918, 1919, 1920, and 1923. As we understand the situation, what the Commissioner did for the purpose of his interest computation was to proceed in the manner in which he would have proceeded if the scheduling of the overpayment for 1917 had awaited final adjustment of the other years then in controversy. In scheduling the overpayment for 1917, as heretofore shown, since the deficiencies for 1919 and 1920 had not been assessed at the time the overpayment for 1917 was scheduled but there was an outstanding original assessment for 1923 against which claims for credit had been filed, the Commissioner applied part of that overpayment in satisfaction of the outstanding original tax for 1923 and re-

funded part of that amount without making any application against the deficiencies for 1919 and 1920 which had not then been finally determined and assessed. However, when he came to make his interest computation, after the deficiencies and overpayments for all years had been finally determined, he (in theory) proceeded, as required by statute, to apply the overpayments against the deficiencies and followed his practice of considering the earliest deficiencies satisfied by the earliest overpayments. In this manner deficiencies for 1919 and 1920 and only the first installment and a part of the second installment for 1923 were considered satisfied from the 1917 overpayment, instead of treating the disposition of the overpayment for 1917 in the manner in which it was originally treated, that is, using approximately one-half thereof to satisfy all of the original tax outstanding for 1923, withholding a part for application against an alleged indebtedness due from plaintiff, and refunding approximately one-fourth thereof. In a similar manner the Commissioner dealt with other items in the computation, without regard to the manner in which the credits and refunds were made.

In view of the circumstances connected with the scheduling of the overpayments for 1917, we find no error in principle in the computation of interest made in that manner. In view of the provisions of the statute requiring the crediting of the overpayments against deficiencies, the only reasonable conclusion from the facts in this case is that but for the agreement which brought about the scheduling of the overpayments, the adjustments for all years would have been made substantially in the manner in which they are now shown as made theoretically for the purpose of interest computation. The agreement serves to explain why the overpayment was scheduled and the refund made when deficiencies were then due from the plaintiff, since express provision is made in the agreement which could protect the Commissioner against an improper interest adjustment. In other words, the refund was only being made with respect to the principal of the overpayment, with the interest adjustment for the years 1917, 1918, 1919, and 1920 held in

abeyance until after a final determination was had for all years. Without the agreement the only legal procedure which the Commissioner could have followed would have been to withhold the scheduling of the overpayment for 1917 until the other years then in controversy were settled, at which time the credit applications could only have been made as they are now shown for the purpose of the interest computation. Cf. *Standard Oil Company of Indiana* v. *United States*, 78 C. Cls. 714.

That when the Commissioner purported to carry out the agreement he credited a part of the 1917 overpayment against an outstanding original assessment for 1923 (a year not mentioned in the agreement) does not alter the situation. That assessment was outstanding and unpaid and there was no alternative for the Commissioner but to satisfy this assessment before he could make a refund sought by plaintiff—the motivating cause of its execution of the agreement. Nor do we think the plaintiff has reason to complain because a portion of the overpayment was withheld by the Comptroller General, pending the determination of an alleged indebtedness due from plaintiff, since plaintiff was well aware that the indebtedness had been asserted and that amounts otherwise due plaintiff, including a part of an overpayment for 1918 (involved in case No. L–125), had been withheld for the same purpose to the extent of $1,226,014.64. The amount withheld out of the 1917 overpayment, $314,458.93, was the balance of the alleged indebtedness.

As a result of the credit made against the 1923 assessment and the withholding on account of the alleged indebtedness, there remained a balance of only $306,079.77 from the determined overpayment for 1917 to be refunded to plaintiff. It should be noted, however, that when refund was made it was of that principal amount without interest, which showed clearly that, insofar as interest was concerned, the action was tentative or preliminary in character pending a final determination of tax liability for the other years in controversy.

When, however, the Commissioner came to make his final interest computation, many of the things done in making

the refunds and credits and collecting the deficiencies had to be disregarded and the entire matter of interest for the several years dealt with on the basis that, but for the agreement which brought about the premature scheduling of the overpayment for 1917, the several years in controversy would have been settled as a group and credits, refunds, and deficiencies taken care of as provided by statute, namely, the crediting of the overpayments against any tax due and the collecting of any net amount due from plaintiff after appropriate adjustment for interest on the basis of such an application of the statute. That such action was proper is fully supported by our decision in *Standard Oil Company of Indiana* v. *United States*, *supra*, and *Eastman Kodak Co.* v. *United States*, 82 C. Cls. 504.

Much is said in the argument by plaintiff about the failure of the Commissioner to carry out the agreement and by defendant about an attempted repudiation of the agreement through the contentions advanced in this suit. Both arguments are beside the point. The agreement was merely an arrangement through which the Commissioner was enabled to schedule an overpayment in advance of the time it should have been scheduled under the statute, but in which provision was made to protect against an excessive allowance of interest. It was performed by the Commissioner to the extent permitted under the statute. Nor is repudiation an issue in arriving at the correct interest computation, for neither party could change the statutory provisions with reference to credits and interest thereon. The agreement served its purpose when the overpayment was scheduled and refund made to the extent permitted under the statutes, except that, as contemplated by the agreement, an interest computation was later required after the tax liabilities for several years were finally determined.

A detailed discussion of the many items entering into the interest computation would serve no useful purpose and would unduly extend this opinion. Suffice it to say that in general we approve the principles followed by the Commissioner in making the interest computation as set out in our findings of fact. The contention by plaintiff that the Commissioner erred in this computation in that he computed

interest after a theoretical application of the earliest overpayments as a credit in satisfaction of the earliest due deficiencies, instead of applying the latest overpayments against the earliest deficiencies, cannot be sustained. No specific statutory provisions exist as to how such a credit application should be made, though the procedure adopted by the Commissioner seems logical and consistent with the statute. Unquestionably, in some cases cited by plaintiff a different rule has been followed in the computation set out in the findings of fact set out in those cases, but no issue was raised on the order of application, and of course it cannot be said that the issue was decided, and, besides, it would appear that the interest computations referred to by plaintiff were made long prior to the interest computation made in the present case. Whether there is a well-established practice in the Internal Revenue Bureau which might be considered as having been sanctioned by Congress through continued enactment of similar credit and refund statutes after a long continued administrative interpretation, we cannot say, since the record is silent on this matter. We shall accordingly not disturb the method which the Commissioner has followed in this case of applying the earliest overpayments against the earliest deficiencies.

Adjustment of the computation will, of course, be necessary by reason of our holding that the plaintiff is entitled to judgment for the amount of $314,458.93 withheld by the Comptroller General on August 21, 1928. In his computation, the Commissioner treated that amount and the amount refunded at or about the same time ($306,079.77) as erroneously refunded and charged plaintiff with interest thereon from August 21, 1928, until the dates in April and May 1931 when the amount was deemed repaid through credit and cash payment upon a settlement of the accounts for the several years. Such computation was proper insofar as it related to the cash refund, but, since the amount withheld has now been found erroneously withheld, it cannot be said that such withholding constituted payment and that interest should be charged thereon. On the contrary, such amount represents a part of an overpayment for 1917 which has not been refunded to plaintiff and upon which, but for

the adjustments required in connection with the other years referred to in this proceeding, interest should be computed in favor of plaintiff from the date the tax was paid to a date preceding the issuance of the refund check by not more than thirty days. See No. L–125, *ante*, p. 173. However since that amount was an overpayment at the time deficiencies were due for other years referred to in this proceeding, and the interest computation has been made on the basis of all years which treated, among other things, the amount withheld as paid, a recomputation should now be made which would reverse that action and allow interest thereon for the time not previously allowed by considering as the date to which interest is allowable a future date preceding the date of the refund check by not more than thirty days. This will make necessary a readjustment of some of the items in the theoretical computation since the amount withheld must now be considered an overpayment for 1917 and as applied for interest purposes as a credit against any deficiencies then due, and then make an appropriate change with respect to other items which are affected thereby.

With respect to other features of the Commissioner's computation, the parties now appear to be in agreement that, under the method followed by the Commissioner of applying the earliest overpayments against the earliest deficiencies, the periods for which interest was computed are correct except as to a part of the overpayment for 1919, $245,751.37, which arose by reason of an amortization claim. On this item defendant properly concedes plaintiff's contention that an informal claim filed November 10, 1921, requires the computation of interest thereon from six months thereafter, namely, May 10, 1922, as provided by section 1324 (a) of the Revenue Act of 1921 (42 Stat. 227, 316).

Plaintiff is entitled to recover and will be awarded judgment in the sum of $314,458.93, with interest thereon, computed in accordance with section 177 (b) of the Judicial Code, as amended, with the readjustment of the interest heretofore paid or credited, as indicated in this opinion. It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

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JOSEPH PETRIN, JOSEPH A. PETRIN, RUDOLPH PETRIN, ANGUS LEBLANC v. THE UNITED STATES

[No. 43480. Decided February 5, 1940. Plaintiffs' motion for new trial overruled May 6, 1940]

On the Proofs

Government contract; damages to subcontractor on account of delay by Government.—Where the contract for the construction of a post-office building provided that the Government should furnish to the prime contractor models for the ornamental stone and marble to be placed in the building, and where there was delay on the part of the Government in the delivery of such models, it is held that a subcontractor alleged to have suffered damages by reason of such delay cannot recover from the Government.

Same; no contract established.—No contractual rights between the subcontractor and the Government were created by the Government's contract with the prime contractor, nor can a contract between them be implied.

Same; jurisdiction under the Tucker Act.—The "Tucker Act" confers jurisdiction upon the Court of Claims to hear and determine claims founded "upon any contract, expressed or implied, with the Government of the United States."

The Reporter's statement of the case:

Mr. Raymond M. Hudson for the plaintiffs.

Mr. George F. Foley, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Leavenworth Colby* was on the brief.

The court made special findings of fact as follows:

1. Plaintiffs are citizens of the United States and residents of the State of Maine.

2. On June 6, 1932, the V. & M. Construction Corporation, hereinafter called the prime contractor, entered into a written contract with the defendant to furnish all labor and materials, and perform all work required for construction, including approach work, of the Post Office, Sanford, Maine. This contract is plaintiff's exhibit No. 1 and made a part hereof by reference.

Reporter's Statement of the Case

3. On August 10, 1932, the prime contractor entered into a subcontract with plaintiffs whereby the plaintiffs agreed to furnish all labor and equipment, including scaffolds, for the Brickwork, Hollow Tile, Granite, Stone Work, and all Exterior Marble, as specified in the contract between the prime contractor and the defendant. The subcontract is plaintiffs' exhibit No. 2 and made a part hereof by reference.

The equipment was owned by the plaintiff, Joseph Petrin, and by agreement with the other plaintiffs, he was to be paid out of the contract price a rental of $150 for ten weeks—the time contemplated to complete plaintiffs' work.

4. Under the prime contract defendant was required to furnish models for the ornamental stone and marble to be placed at the tops and sides of the entrances of the building.

5. Plaintiffs commenced work on the project on or about August 24, 1932. After several weeks the plaintiffs' work was retarded chiefly by the failure of the defendant to deliver the models referred to in the preceding finding. The failure to deliver the models was due to the fault of the defendant. This delayed plaintiffs' work. Plaintiffs had contemplated that it would take them 10 weeks to complete their work. They completed their work June 1, 1933. After the models were furnished by the defendant, the stone and marble were carved and delivered on the job on or about March 13, 1933. Due to the delay of the defendant in delivering the models, the prime contractor's time to complete the building was extended 116 days.

6. During the delay caused by the defendant's failure to make timely delivery of the models, plaintiffs were on the job ready to perform their part of the contract but were required to wait from day to day thereby losing 91 working days.

The reasonable value of their services and of the rental value of the equipment during the period of delay was as follows:

Joseph Petrin, foreman, 91 days at $8.00 per day	$728
Joseph A. Petrin, laborer, 91 days at $6.00 per day	546
Rudolph Petrin, laborer, 91 days at $6.00 per day	546
Angus LeBlanc, laborer, 91 days at $6.00 per day	546
Equipment owned by Joseph Petrin, 91 days at $3.00 per day	273
Total	2, 639

The court decided that the plaintiffs were not entitled to recover.

WILLIAMS, *Judge*, on February 5, 1940, delivered the opinion of the court:

On June 6, 1932, the V. & M. Construction Corporation, herein called the prime contractor, entered into a written contract with the defendant for the construction of a post office at Sanford, Maine. Thereafter, on August 10, 1932, plaintiffs entered into a written contract with the prime contractor whereby they agreed to furnish all labor and equipment for the brick work, hollow tile, granite, stone work, and all exterior marble, as specified in the contract between the prime contractor and the defendant. By the terms of the contract between the defendant and the prime contractor, the defendant agreed to furnish the prime contractor models for the ornamental stone and marble to be placed at the tops and sides of the entrances of the post-office building. During the progress of construction delays occurred in the delivery of the aforesaid models by the defendant to the prime contractor. This suit is brought by the plaintiffs to recover damages alleged to have been suffered by them by reason of the defendant's delay in furnishing the models as agreed to the prime contractor.

The plaintiffs' contract was with the V. & M. Construction Corporation and not with the defendant. There is no showing whatever of any contract, express or implied, between the plaintiffs and the defendant. While the defendant agreed in its contract with the prime contractor to furnish the models for the ornamental stone and marble to be placed on the post-office building, plaintiffs herein were not parties to that agreement. No contractual rights between the plaintiffs and the defendant were created by the defendant's contract with the prime contractor, nor does it appear that a contract between them can be implied in fact.

The Tucker Act, Section 145 of the Judicial Code, 24 Stat. 505, confers jurisdiction upon this court to hear and determine claims founded "upon any contract, express or implied, with the Government of the United States." Obviously the claim upon which plaintiffs sue is not so founded.

Opinion of the Court

As the plaintiffs were not parties to the contract between the prime contractor and the defendant they have no rights under it and cannot maintain suit. *New York Shipbuilding Corp.* v. *United States*, 61 Ct. Cls. 357; *United States* v. *Driscoll*, 96 U. S. 421; *H. Herfurth, Jr., Inc.*, v. *United States*, 89 Ct. Cls. 122; *Merritt* v. *United States*, 267 U. S. 338.

In *Merritt* v. *United States*, *supra*, the court said:

> Plaintiff cannot recover under the Tucker Act, Judicial Code, § 145, 24 Stat. 505. The petition does not allege any contract, express or implied in fact, by the Government with the plaintiff to pay the latter * * *. Nor does it set forth facts from which such a contract will be implied.

In *United States* v. *Driscoll*, *supra*, the court said:

> It is clear that there was no privity between the appellee and the United States. Ordway employed him and was to pay him, and did pay him. The United States had no interest in the rate or amount paid, save that the sum so paid, with fifteen percent in addition, was the measure of the amount to be paid to Ordway.

In the recent case of *Herfurth* v. *United States*, *supra*, this court, in dismissing the petition brought by a subcontractor, said, "plaintiff was not a party to the contract and therefore cannot bring suit against the Government."

The petition is dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge;* took no part in the decision of this case.



CASES DECIDED

IN

THE COURT OF CLAIMS

December 4, 1939 to March 31, 1940

INCLUSIVE, IN WHICH EXCEPT AS OTHERWISE INDICATED, JUDGMENTS WERE RENDERED WITHOUT OPINIONS

No. 43773. February 5, 1940

Thomas Commings.

Pay and allowances; right to retire after thirty years' service. Opinion 89 C. Cls. 498.

In accordance with its opinion of November 6, 1939, and on a report from the General Accounting Office as to the amount due thereunder, the Court rendered judgment for the plaintiff in the sum of $4,745.67.

No. 43824. February 5, 1940

James Dene.

Pay and allowances; retirement of enlisted man after thirty years' service; right to retire absolute. Opinion 89 C. Cls. 502.

In accordance with its opinion of November 6, 1939, and on a report from the General Accounting Office as to the amount due thereunder, the Court rendered judgment for the plaintiff in the sum of $2,581.00.

No. 44054. February 5, 1940

Lyle M. Shields.

Property of Army officer lost, damaged or destroyed. Findings of fact and conclusion of law. Decided upon the authority of *Jonitz*, 89 C. Cls. 155. See also the case of *Orville Jackson*, *ante*, p. 526. Judgment for the plaintiff in the sum of $508.60.

No. 44051. FEBRUARY 5, 1940

Charles D. McColl.

Property of Army officer lost, damaged or destroyed. Findings of fact and conclusion of law. Decided upon the authority of *Jonitz*, 89 C. Cls. 155. See also the case of *Orville Jackson*, *ante*, p. 526. Judgment for the plaintiff in the sum of $568.60.

No. 43483. FEBRUARY 5, 1940

Joseph Petrin.

Petition dismissed in a memorandum as follows:

> Plaintiff in this case brings suit as a subcontractor. He does not allege in the petition that he had a contract, express or implied, with the United States. In fact the petition shows on its face that he had no such contract. The court is therefore without jurisdiction to hear and determine the case. *Joseph Petrin et al.* v. *United States*, No. 43480, this day decided (*ante*, p. 670); *New York Shipbuilding Corp.* v. *United States*, 61 Ct. Cls. 357; *United States* v. *Driscoll*, 96 U. S. 421; *H. Herfurth, Jr., Inc.*, v. *United States*, 89 Ct. Cls. 122; *Meritt* v. *United States*, 267 U. S. 338.

Plaintiff's motion for new trial overruled May 6, 1940.

No. 43482. FEBRUARY 5, 1940

Samuel Fishman, Hector La Porte.

Petition dismissed on the same grounds as *Petrin*, *supra*. Plaintiffs' motion for new trial overruled May 6, 1940.

No. 43481. FEBRUARY 5, 1940

William J. De Melle.

Petition dismissed on the same grounds as *Petrin*, *supra*. Plaintiff motion for new trial overruled May 6, 1940.

No. 44754. MARCH 4, 1940

Louisville Bridge Commission.

Transportation of troops and munitions over toll bridge. Decided upon the authority of *Louisville Bridge Commission*, (No. 43749), 89 C. Cls. 493.

Judgment for the plaintiff in the sum of $3,180.10.

No. 43521. MARCH 4, 1940

Charles Elcock.

Rental allowance; Captain in the Engineer Reserves, United States Army, on active duty with the Civilian Conservation Corps. Findings of fact and conclusion of law. Judgment for the plaintiff in the sum of $499.50.

No. 43348. MARCH 4, 1940

Landis & Young, Builders.

Government contract; delay by the Government. Findings of fact and conclusion of law; judgment for the plaintiff in the sum of $2,483.55, in a Memorandum Per Curiam as follows:

> The plaintiffs' claim is amply supported by the evidence. There is no contention on the part of the defendant that the plaintiffs are not entitled to recover. The amount of their loss and damage cannot be exactly computed, but we think the commissioner of this court correctly estimated it at $2,483.55.
>
> A stipulation has been filed in the case setting out that The Aetna Casualty & Surety Company, a corporation, was surety on the bond of the plaintiffs for the performance of the contract and for the payment to all persons furnishing labor and material for use in the work. The plaintiffs acknowledge that the surety has been obliged to pay a sum considerably in excess of the amount claimed in the suit and for which it has not been reimbursed, as a consequence of which the surety is entitled to an equitable subrogation. The parties agree that judgment may be entered in the name of the plaintiffs for the use of The Aetna Casualty & Surety Company, and it is so ordered.

COTTON LINTER CASES

In the following cases involving claims for damages for breach of World War contracts for cotton linters, pursuant to the stipulation filed in the case of *Rose City Cotton Oil Mill* v. *United States*, Congressional No. 17341 (and all other pending cotton linter cases as per list attached to said stipulation), and the agreement of the parties, judgments against the Government were rendered as indicated:

ON DECEMBER 4, 1939

D-1097. Peoples Cotton Oil Co., Receivers, $6,610.15.

No. 17425, Congressional. McNair-Young Co., Liquidating Agent, $8,475.17.

No. 17494, Congressional. Winterville Cotton Oil Co., $4,437.31.

No. 17535, Congressional. Timmonsville Oil Co., $1,526.69.

No. 17542, Congressional. Lake County Manufacturing Co., $14,102.03.

ON FEBRUARY 5, 1940

No. 17367, Congressional. Alabama Oil & Guano Company, $1,686.94.

No. 17548, Congressional. Ripley Oil Mills, Rufus Campbell, Receiver, $4,452.43.

No. 17549, Congressional. Continental Cotton Oil Co., Laura O. Guitar et al., $1,020.87.

CASES DISMISSED BY THE COURT OF CLAIMS ON MOTION OF PARTIES, OR OF THE COURT FOR NONPROSECUTION

Cases Pertaining to Refund of Taxes

ON DECEMBER 4, 1939

42014. The Scituate Water & Gas Co.
43754. Carl Holmes.
44016. Eugene A. Kingman et al.
44109. Havana Electric Railway, Light and Power Co.
44272. The American Trust & Savings Bank.
44681. Eugene A. Kingman et al.
44880. The May Department Stores Co.

ON DECEMBER 7, 1939

42830. Sylvester D. Townsend, et al., receivers for Eastern Bankers Corporation.

ON DECEMBER 9, 1939

44820. J. N. Adam & Co.
44821. Associated Dry Goods Corporation.
44822. Eight Fifteen Glenwood Corporation.
44823. Hahne & Co.
44824. Hahne Realty Corporation.
44825. The William Hengerer Company.
44826. Hengerer Realty Corporation.
44827. Powers Dry Goods Co., Inc.
44828. Powers Realty Corporation.
44829. Stewart & Co., Inc.
44830. The Stewart Dry Goods Co.
44831. Stewart Realty Corporation.

ON JANUARY 8, 1940

K–491. The Prest-O-Lite Company.
42622. Hecla Coal & Coke Co.
42939. General Motors Corporation, Buick.
43075. General Motors Corporation, Olds.
43076. General Motors Corporation, G. M. C. Truck.
43077. General Motors Corporation, Buick.
43078. General Motors Corporation, Chevrolet.
43083. Hecla Coal and Coke Company.
43537. The Corbitt Company.
43652. Alfred L. Rose, et al.
43104. Louis H. Pink, Supt., et al.
43367. Empire Trust Company.
44091. Orville S. Hershey, et al.

ON JANUARY 10, 1940

44943. Willard Storage Battery Company.

ON JANUARY 8, 1940

(On the authority of Allied Agents, Inc., 88 C. Cls. 315)

44784. Brauer Brothers.
44792. Railway Exchange Building.
44801. Progressive Service Company.
44802. Pelligreen Real Estate Company.
44805. Cornell Seed Company.
44833. Calion Lumber Company.
44855. Thomas & Proetz Lumber Company.
44856. Beltex Lumber Company.

ON FEBRUARY 5, 1940

43513. Sherlock Bronson & F. Justin Moore, Receivers, American Bank & Trust Company.
43636. The H. C. Godman Company.
44626. Van Campen Heilner.
44627. Frank L. Check.
44733. Henry L. Blum.
44786. The Delaware, Lackawanna and Western Railroad Company.
44789. Holland Furnace Company.
44790. Oscar Heineman Corporation.
44791. Cherry-Burrell Corporation.
44859. The Visking Corporation.
44891. Woodward & Lothrop.

ON FEBRUARY 5, 1940

43839. The Carribean Petroleum Co.
44635. Aviation Corporation.
44909. The American Ship Building Co.
44910. Buffalo Dry Dock Company.
44911. The Superior Shipbuilding Co.

ON MARCH 4, 1940

43993. The Pure Oil Company.
44083. Erret L. Cord, Lucius B. Manning, et al.
44098. Mollie Netcher Newbury.
44693. Valentine Everit Macy, Jr., et al., executors.

ON MARCH 29, 1940

44895. California Corrugated Culvert Co.
44902. Sheffield Steel Corporation.
44903. The American Rolling Mill Co.
44904. Lake Erie Steel and Blanking Co.
44905. The Armco International Corporation.
44918. General Milk Company, Inc.
44941. American Brake Shoe and Foundry Co.

Cases for Property Taken Under the Flood Control Act of May 15, 1928 (War Department)

ON JANUARY 8, 1940

42715. General American Life Ins. Co.
42718. Southeast Arkansas Levee District, a corp., etc.
42719. Cypress Creek Drainage District, a corp., etc.
42720. Eudora Western Drainage District, a corp., etc.
42721. Jefferson Investment Co.
42722. Anna B. Hight & Feree Hight.
42723. John Lynn Parker.
42724. Tom H. Free.
42725. Tillar Mercantile Co., a corp., et al.
42726. Lawrence Wolfe.
42727. E. E. Hopson, Sr., guardian, etc.
42728. W. Elmo Thompson & Edwin E. Hopson.
42729. Thomas D. Newton et al.
42730. Bertie C. Prewitt.
42731. Edwin E. Hopson.
42732. Passumpsic Savings Bank.
42733. Jesse R. Prewitt & Taylor A. Prewitt.
42734. Guy H. Courtney et al., etc.
42735. C. Turner Neal.
42736. Vestal Lumber & Mfg. Company.
42737. Fannie Stroud.
42738. Edward C. Hussleton.
42739. William M. Snow.
42740. William C. Reitzammer.
42741. Ed McGaugha & Hugh Lee Williams.
42742. Proctor Trust Company.
42743. Proctor Trust Company.
42744. Passumpsic Savings Bank.
42745. Abner McGehee et al., trustees.
42746. R. H. Wolfe, attorney in fact, est. of T. F. Tillar, dec'd.

42767. Jesse McDonald et al., etc.
42768. Albert Carl Zellner et al., etc.
42769. James L. Flowers, etc.
42770. Est. of F. B. Douglass, etc.
42771. Floyd Matson, admr. W. D. Halley.
42780. Walter E. Taylor and Thomas C. Trimble, Jr.
42871. Jerome Hardwood Lumber Co.
42881. C. C. Hawkins.
42890. R. F. White & Nelle B. White.

ON FEBRUARY 5, 1940

Cases dismissed on motions by the several plaintiffs:

42782. Kansas City Life Ins. Company.
42783. Kansas City Life Ins. Company.

ON MARCH 4, 1940

42777. Turner Lumber Company.

Cases for Property Taken Under the Flood Control Act of May 15, 1928

ON FEBRUARY 5, 1940

Cases Dismissed on the Authority of *United States* v. *Sponenbarger*, 308 U. S. 256, decided December 4, 1939, on motions by the defendant, the several plaintiffs consenting:

42747. St. Louis Union Trust Co.
42748. Franklin-American Trust Co.
42749. First National Bank, etc.
42750. St. Louis Union Trust Company.
42751. St. Louis Union Trust Company.
42752. Mercantile-Commerce Bank & Trust Company, trustee.
42753. Mercantile-Commerce National Bank in St. Louis, trustee.
42754. Sam J. Wilson.
42755. Joe W. Pugh.
42756. John C. Wells.
42757. Med Cashion.
42758. Morris E. Rosenzweig.
42759. New Netherland American Mortgage Bank, Ltd.
42760. Harvey Parnell & Mabel Parnell.
42761. Ike H. Noyes et al.
42762. Georgia Pembroke.
42763. Pete Mulligan.
42764. Sam Epstein.
42765. Victor B. Kieffer et al.
42766. Jacob C. Gillison.
42773. Macon Lake Plantation Co., etc.
42774. Sorrells O. Savage.
42779. St. Louis Union Trust Co.
42845. Mercantile-Commerce Bank & Trust Co., trustee.

Cases Involving Indian Claims

ON DECEMBER 4, 1939

L-78. The Creek Nation.
L-123. The Seminole Nation.
L-266. Cherokee Nation.

ON JANUARY 8, 1940

L-257. The Cherokee Nation.
E-350. The Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians.

ON JANUARY 27, 1940

L-253. Choctaw and Chickasaw Nations.

Cases Involving N. I. R. A. Act of June 25, 1938

ON FEBRUARY 5, 1940

44556. Eliseo V. Ricci.

ON MARCH 4, 1940

44510. The First National Bank of Chicago, assignee.

Case Involving Damages for Breach of Contract for Cotton Linters

ON JANUARY 8, 1940

Congressional, No. 17525. Liberty Oil Mill.

Miscellaneous

ON JANUARY 8, 1940

43694. Frank Stefani.
43847. Holland Construction Company.

ON FEBRUARY 5, 1940

45001. Holland D. Collie.

ABSTRACT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

A. F. HAMACEK MARINE CORPORATION

[No. K-185]

[88 C. Cls. 369; 308 U. S. 619]

Patent for improvement in "Ships"; lack of proper description. Petition dismissed March 6, 1939; plaintiff's motion for new trial overruled May 29, 1939.

Petition for writ of certiorari *denied* by the Supreme Court, December 11, 1939.

THE WINCHESTER MANUFACTURING COMPANY v. THE UNITED STATES

[No. 42518]

[88 C. Cls. 89; 308 U. S. 621]

Income and profits tax; amendment to claim for refund filed after time limit; valuation of inventory.

Judgment for plaintiff November 14, 1938; plaintiff's motion for new trial overruled March 6, 1939; plaintiff's second motion for new trial overruled May 29, 1939.

Petition for writ of certiorari *denied* by the Supreme Court December 18, 1939.

CHEROKEE FUEL COMPANY v. THE UNITED STATES

[No. 43289]

[89 C. Cls. 279; 309 U. S. —]

Government contract; cancellation; schedule of delivery calls; termination of contract. Petition dismissed May 29,

1939; plaintiff's motion for new trial overruled October 2, 1939.

Petition for writ of certiorari *denied* by the Supreme Court January 29, 1940.

[No. 43256]

C. W. BLAKESLEE & SONS, INC., AND BLAKESLEE-ROLLINS CORPORATION v. THE UNITED STATES

[89 C. Cls. 226; 309 U. S. —]

Government contract; knowledge of conditions. Decided May 1, 1939; petition dismissed. Plaintiffs' motion for new trial overruled October 2, 1939.

Petition for writ of certiorari *denied* by the Supreme Court February 5, 1940.

BERLINER HANDELS-GESELLSCHAFT v. THE UNITED STATES

[No. 42542]

[90 C. Cls. 75; 309 U. S. —]

Capital stock excise tax; foreign corporation engaged in business in United States. Decided December 4, 1939; petition dismissed, *ante*, p. 75.

Petition for writ of certiorari *denied* by the Supreme Court March 11, 1940.

WHITNEY KERNOCHAN, EXECUTOR OF THE WILL OF FREDERIC KERNOCHAN v. THE UNITED STATES

[No. 44023]

[89 C. Cls. 507; 309 U. S. —]

Estate tax; contributions to Retirement Fund not insurance. Decided November 6, 1939; petition dismissed.

Petition for writ of certiorari *denied* by the Supreme Court, March 25, 1940.

CUBAN-AMERICAN SUGAR COMPANY v. THE UNITED STATES

[No. 43206]

[89 C. Cls. 215; 309 U. S. —]

Income tax; special assessment; discretion of Commissioner. Petition dismissed May 1, 1939; plaintiff's motion for new trial overruled October 2, 1939.

Petition for writ of certiorari *denied* by the Supreme Court April 1, 1940.

JOHN P. SQUIRE COMPANY v. THE UNITED STATES

[No. 44048]

[90 C. Cls. 276; — U .S. —]

Processing taxes and export drawbacks; account stated. Petition dismissed January 8, 1940.

Petition for writ of certiorari *denied* by the Supreme Court April 22, 1940.

BRITISH AMERICAN TOBACCO COMPANY, LTD., v. THE UNITED STATES

[No. 43217]

[89 C. Cls. 438; — U. S. —]

Jurisdiction; suits instituted upon same set of facts. Petition dismissed November 6, 1939; plaintiff's motion for new trial overruled January 8, 1940.

Petition for writ of certiorari *denied* by the Supreme Court, May 6, 1940.

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INDEX DIGEST

I. Private property of an Army officer lost or damaged while in a private residence because no public quarters were available was "in the military service" within the meaning of the Act of March 4, 1921. *Jonitz* v. *United States*, 89 C. Cls. 155, cited. *Jackson*, 526.

II. Under section 4 of the Act of March 4, 1921, the decision of the Secretary of War was "a final determination of any claim cognizable under this chapter." *Id.*

ASSISTANT U. S. ATTORNEY.

I. Authority to employ and retain, in the name of the United States, attorneys to assist the district attorneys is vested by statute solely in the Attorney General of United States. *Vlachos*, 165.

II. An attorney accepting an appointment as assistant to the United States attorney was charged with constructive knowledge of the conditions of the appointment. *Id.*

III. He who is without authority to bind his principal by an express contract cannot be held to have done so by implication. *Id.*

CONTRACTS.

I. Where contract between the plaintiff contractor and the Government provided that of the persons employed on the project preference should be given to persons referred for such work by the United States Employ-

CONTRACTS—Continued.

to the Navy Yards at Puget Sound and Mare Island, respectively, blowers were subjected to tests and inspections which disclosed defects, being out of balance dynamically, and having other faults, all of which were officially called to the attention of plaintiff. After correction by the Navy Yard employees of discoverable defects and certain other changes and repairs, the blowers were finally installed in the cruisers and have since operated satisfactorily at the required speeds. The Navy Department, in its settlement with plaintiff-contractor, deducted from the contract price the cost of making the repairs and changes which were necessary to make them conform to the provisions of the contract. The plaintiff sues for the recovery of the amount so withheld.

Held.

V. There was no unwarranted deviation by the defendant from the terms of the contract and specifications in remedying and correcting the defects found to exist in the blowers upon delivery. *Sturtevant*, 93.

VI. Changes in a manufactured article may not arbitrarily be made and charged to the contractor's account. *Id.*

VII. In the instant case, it is held that no proof is submitted to show that plaintiff sustained any damage by reason of action of defendant. *Id.*

VIII. Plaintiff, under a contract with the Treasury Department, Procurement Division, agreed to furnish and deliver, and did furnish and deliver, approximately 30 tons of structural steel to be used in the construction of a portable grandstand. After such delivery, a question arose as to 6,500 angles required for completing the structure. Plaintiff, though contending the contract did not require it to furnish these angles, nevertheless agreed to furnish said angles in order that the grandstand might be used for a parade, with the understanding plaintiff would later present a claim for payment.

Held:

The contract required the plaintiff to furnish only the 30 tons of structural steel required for 300 bents, as shown on the drawing, but not the 6,500 angles, also shown on drawing. *Williams Iron & Bronze*, 111.

IX. Contractor entered into contract with the Government to supply all labor and material and to construct bathhouse, swimming pool and other playground structures on High School grounds in the City of Washington, D. C., and began work on the contract; whereupon contractor received notice that the Comptroller General

CONTRACTS—Continued.

XXXVI. Where liquidated damages were charged against the plaintiff under Article 9 of the contract for failure to complete the work in time, it is held that such failure was entirely due to insufficient equipment, delay in getting dredges to the site of the work, and the method used in performing the work that caused slides, for all of which plaintiff was responsible. *Id.*

XXXVII. Where refusal of the contracting officer to permit partial payments caused plaintiff to borrow large sums of money, it is held that such refusal was within the discretion of the contracting officer, and the plaintiff is not entitled to recover for interest paid; the claim is in form for damages but in substance it is for interest. *Id.*

XXXVIII. Where under a contract for the delivery of hay to Army post, plaintiffs were required to make delivery of the number of tons of hay called for within a reasonable time, or as needed by the Government, not to exceed 15 tons a day, it is held that six months was a reasonable time for compliance with the contract and letters from the defendant to plaintiffs, asking for delivery, are sufficient to show that defendant needed the hay, and accordingly plaintiffs were in default. *Mueller-Huber Grain Co.*, 401.

XXXIX. Where contract for delivery of hay to Army post called for delivery of a certain number of tons during March, beginning March 15, at a rate not exceeding 15 tons a day, and delivery schedule provided that the balance should be delivered at the same rate during April and May, effective April 1 and May 1, but contract was not executed by the Government until March 27, it is held that plaintiffs were not in default when the contracting officer of the Government so declared on April 4, and such action by the contracting officer operated to breach the contract. *Id.*

XL. The contract did not become effective until it was executed by the defendant on March 27 and that date operated also to extend the contract time for performance by the number of days between March 18, when the contract was forwarded to plaintiffs and March 27, when it was executed by the defendant. *Id.*

XLI. Where hay delivered by the plaintiffs to Army post under contract complied with the provisions of the contract and with Department of Agriculture specifications but was rejected by the Army hay inspector and upon analysis was found to comply with the specifications, it is held that such rejection was improper and unauthorized, and was a breach of the contract on the part of the defendant. *Id.*

CONTRACTS—Continued.

XLII. Where contractor, in response to an invitation by the Bureau of Yards and Docks, Navy Department, submitted a bid for furnishing certain materials and performing certain work at the Mare Island Navy Yard, and where after said bid was submitted but before said bid was accepted, contractor discovered that it had made an erroneous calculation, based on a misunderstanding of a subcontractor's proposal and price; and contractor thereupon requested that it be permitted to withdraw said bid because of said error, and such permission was refused by the defendant, and thereafter the contractor refused either to enter into a contract or to furnish the material and perform the work covered by the bid, it is held that the action of the Comptroller General in withholding from plaintiff out of moneys due plaintiff under another, subsequent contract the difference between contractor's bid on the Mare Island project and the next lowest bid was illegal. *Alta Electric*, 466.

XLIII. Plaintiff, it is held, had the right to withdraw its bid and having had this right could not be penalized because of its refusal to sign the contract or to perform the work or to furnish the material contemplated by the bid. *Id.*

XLIV. Where plaintiff entered into a contract with the Government to "furnish all labor and materials, and to perform all work required for construction of foundations, etc.," for the Department of Justice Building, Washington, and where it developed that in the drawings and specifications there was an erroneous calculation as to the length of the piles to be driven, on which erroneous calculation plaintiff made its bid, and in the resulting disagreement as to settlement, the matter was referred to the Comptroller General with a recommendation for equitable adjustment and with a finding of fact by the contracting officer in which the contracting officer held the conditions were radically different from those on which the plans were drawn and the specifications made and on which the plaintiff had based its bid, and the Comptroller General ruled that section 193 of the specifications governed, and in the settlement the Government deducted from the contract price the sum of $161,266.25, in accordance with the ruling of the Comptroller General, it is held that the contractor was entitled to have the contracting officer construe the contract and arrive at a determination

FEDERAL FARM BOARD.

I. Upon the Commissioner's report, pursuant to the act of Congress directing an investigation to be made concerning losses sustained during the stabilization operations of the Federal Farm Board in 1929 and 1930 by cooperative associations to which loans were made for the purpose of withholding grain from the market and for making advances to their members to stabilize prices, it is found by the Court that there was no valid contract between the plaintiff and the Federal Farm Board, as to payment by the Board of storage and carrying charges incurred by the plaintiff and hence no legal or equitable obligation on the part of the United States to reimburse the plaintiff for any of its losses. *South Dakota Wheat Growers*, 222.

II. Whether any moral obligation was created is for Congress, not for the Court, to determine. *Id.*

III. The evidence shows that the endeavor of the Federal Farm Board, acting through the Stabilization Corporation, to prevent a decline in the market price of wheat had a beneficial result. *Id.*

FRAUDULENT ENTRY.

I. Certificate of entry on coal land in Alaska having been obtained by fraud on the Government, as established by the evidence, and plaintiff having also entered into

RENTAL OF PROPERTY BY GOVERNMENT.

I. Where representative of the Government negotiated with the plaintiff for rental of space for certain Governmental agencies and in pursuance of such negotiations plaintiff made extensive alterations to suit the needs of the respective agencies, twelve of the agencies entering into leases with plaintiff commencing on June 30, 1930, for one year, renewable from year to year at the option of the Government until and including the year 1935, and where one of the said agencies, the Internal Revenue Bureau, before the time for acceptance of the space reserved for it in plaintiff's building refused to execute the proposed lease, to move into the building or to use the space reserved by it, and has never occupied said space, it is held that a breach of the contract occurred at that time, July 1, 1930, and plaintiff then had cause of action for the rent as it accrued. *Brownstein-Louis Co.*, 1.

II. Plaintiff, it is held, also had an option to delay the commencement of a suit until a full year's rent had been earned and upon failure to make payment of rent a cause of action accrued. *Id.*

III. Plaintiff, having delayed to bring suit for more than six years, its petition having been filed on October 10, 1938, it is held that the cause of action is barred under the provisions of Section 156 of the Judicial Code, which imposes a limitation of six years in which suit may be brought after a claim accrues. *Id.*

TAXES—Continued.

LXXIII. The essential elements of an account stated are an agreement between the parties on the statement of the account and a promise, express or implied, on the part of the debtor to pay the balance. *Id.*

LXXIV. Where a non-resident alien was a member of a partnership doing business in the United States and deriving a portion of its income from sources without the United States, it is held that he is entitled to exclude from his gross income for income tax purposes his distributive share of the partnership income so derived, under Section 213 (c) of the Revenue Act of 1918. *Craik*, 345.

LXXV. Congress intended, in various income tax acts since 1913, to treat partnership income as if the distributive share of each partner therein had been received directly by the partner. *Id.*

LXXVI. The treatment of partnership income on the same basis as if it had been received by the partner directly is consistent with the common law idea of partnership, according to which the personal property of the partnership was held not by the partnership but by the partners in common. *Id.*

LXXVII. By the specification of certain items for which the partner might take credit Congress did not intend to exclude all others, if such exclusion would result in the treatment of partnership income otherwise than if such income had been received by the partners individually. *Id.*

LXXVIII. It is within the power of Congress to limit deductions from gross income to any extent that Congress may deem wise. *Id.*

LXXIX. Income from a "domestic partnership" is not income from sources within the United States where a portion of such income is derived from sources without the United States. *Id.*

LXXX. The Revenue Act does not regard a partnership as a separate entity. *Id.*

LXXXI. Where plaintiff filed no claim for refund and suit was brought after the expiration of the statute of limitations; and where the evidence shows, and the plaintiff admits, no account stated had been established, it is held that suit for recovery of overpayment of income tax cannot be maintained. *Brooks-Scanlon*, 353.

LXXXII. The mere statement of a credit, in a certificate of overassessment, does not create a cause of action against the Government. *Id.*

TAXES—Continued.

TAXES—Continued.

claim for refund by the rightful owners of the property would not be an appropriate action for said owners to take, since it was not claimed that said owners had paid or had assessed against them any taxes. *Id.*

CXVIII. A refund claim is an appropriate action under the revenue statutes to recover money paid as taxes when such claim is made by the party who paid the tax. *Id.*

Where plaintiff on July 14, 1932, executed an instrument creating an irrevocable trust for the benefit of the trustor's living grandchildren (eight in number being specifically named) and other grandchildren who might thereafter be born, and providing that for ten years from the date of its execution the income from the trust fund should be accumulated and invested, and that at the expiration of the 10-year period the trustee should pay a distributive equal share of the income to each grandchild who had reached 21 years of age, with further provisions for the subsequent disposition of the trust fund; and where plaintiff on December 28, 1934, executed an instrument creating an irrevocable trust, the income from which was to be paid to the trustor's wife and three daughters in equal proportions, with further provisions for the disposition of the trust income upon the death of the wife and daughters, and where gifts were made to the "children's trust" in the years 1932, 1933, 1934 and 1935 and to the trustee of the "adult trust" in 1934, it is held:

CXIX. (1) That the gifts set up by plaintiff in the two trusts were gifts of present interests in the property transferred; and

CXX. (2) That each beneficiary named in the respective trust instruments is a donee within the provisions of section 504 (b) of the gift-taxing statute of 1932, and that the taxpayer is entitled to a $5,000 exclusion in each of the years 1932, 1933, 1934 and 1935 for each of the gifts made in trust for the benefit of the eight named and living grandchildren, and for the year 1934 for each of the gifts made in trust for the benefit of the taxpayer's wife and three daughters. *Pelzer*, 614.

CXXI. Where contractor, in submitting a bid for furnishing canvas cots for the Army, followed instructions of defendant's contracting officer and did not include in its bid the processing taxes levied with respect to those component parts of the cots which had been processed from cotton but later made claim for the increased costs incurred by reason of the processing tax paid on such component parts, it is held that plaintiff is en-

U. S. SHIPPING BOARD.

I. In a controversy arising out of the requisitioning in 1917 by the United States of the hulls of four steamships under construction in the United States for foreign concerns and the contracts for their completion, whereby the plaintiff claims its predecessor in interest was deprived of the right to operate the steamships when completed on the initial voyage from New York to France, and of the profits resulting therefrom, it is held that where there was nothing to prevent plaintiff's predecessor from pressing its claim to a conclusion before the Shipping Board in the first instance, and no delay shown to be attributable to the Shipping Board, or its subsidiary, the Fleet Corporation, and where the delay was wholly due to plaintiff's own actions, the statute of limitations applies. *Dawnic*, 537.

II. Under the provisions of the Act of June 15, 1917, as modified by the Merchant Marine Act of June 5, 1920, the claimant whose property had been requisitioned must first present his claim to the Emergency Fleet Corporation (Shipping Board) for a ruling thereon, but this procedure does not prevent the application of the general statute of limitations applicable to all cases commenced in the Court of Claims. *Id.*

III. The statute of limitations is established to prevent the prosecution of stale claims when the opposing party may not be able properly to contest them on account of the lapse of time. *Id.*

IV. If a party who is required to do some preliminary act before commencing suit were permitted to take his own time to complete the act, the effect would be to exempt him from the statute of limitations. *Id.*









